I. SCOPE OF COMMISSION'S AUTHORITY TO MODIFY CONDITIONS OF UNE ACCESS OR TO PRESCRIBE ADDITIONAL UNES

The HEPO's recommended Commission Analysis and Conclusion Section on pages 9-10 should be replaced with the following:

Commission Analysis and Conclusion:

Under Illinois law, this Commission is authorized to require changes to a proposed tariff to the extent those changes are required to render the tariff "just and reasonable." The tariff at issue in this proceeding, however, raises questions about the scope of our authority because it was designed to implement Ameritech Illinois' *federal* obligation to provide requesting carriers with access to the HFPL UNE. The scope of our authority is further in question because the CLECs are requesting that we use this tariff proceeding to establish additional unbundling obligations. Under the Act, requesting carriers are entitled to obtain access to UNEs only through interconnection agreements negotiated and arbitrated under Section 252 of the Act. Given the nature of this tariff and the unbundling proposals made by the CLECs, federal law plays a plenary role in determining the scope of our review authority in this proceeding. Based on a thorough examination of the law, we find that this Commission lacks authority to order additional unbundling obligations in the context of this tariff proceeding for several reasons.

First, this Commission lacks authority to impose additional unbundling obligations as part of Ameritech Illinois' HFPL UNE tariff. The Seventh Circuit has held that the unbundled network element access and interconnection rights and obligations established by the Act are not self- executing, but rather "exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition." *Goldwasser v. Ameritech Corp*., 1998 WL 60878, *11 (N.D. Ill. Feb. 4, 1998), aff'd, 222 F.3d 390 (7th Cir. 2000) (emphasis added). Section 251(c)(1) requires both incumbent LECs and CLECs to "negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements to fulfill the duties described in" Sections 251(b) and (c) (emphasis added). Section 252 "sets forth the procedures that individual entrants and incumbent LECs must follow when implementing the requirements of Section 251." *See* Opening Brief for the Federal Petitioners at 6, *FCC v. Iowa Utilities Board*, No. 97-831 (U.S., filed April 3, 1998) (available on Westlaw at 1998 WL 396945, *26). This scheme – which makes the "interconnection agreement" the vehicle by which CLECs may take advantage of any valid federal and state interconnection and unbundling requirements – prevents this Commission from requiring Ameritech Illinois to tariff any additional interconnection or UNE obligations that this Commission may impose.

This conclusion is consistent with *MCI Telecomms. Corp. v. GTE Northwest, Inc*., 41 F.Supp.2d 1157 (D. Or. 1999), where the court held that the Act's contract-centered framework preempts the use of state tariffs to implement unbundled access and interconnection duties. In that case, the state commission ordered GTE to file a tariff defining the terms and prices for all network elements the commission had decided must be unbundled. GTE argued that this tariff process was preempted by the Act. The district court agreed, finding that the Oregon commission had illegally "dispensed with the interconnection agreement altogether and is allowing CLECs to order services 'off the rack' without an interconnection agreement." *Id.* at 1178. Such a procedure, the district court held, "bypasses the Act entirely and ignores the

procedures and standards that Congress has established. The [state commission] may take steps to expedite the interconnection process, but it must do so within the overall framework established by the Act." *Ibid*. (emphasis added). Consequently, the court held that the UNE tariff "conflicts with the Act and is preempted." *Ibid*. The same reasoning applies here with respect to additional unbundling obligations not addressed by Ameritech Illinois' HFPL UNE tariff. If this Commission were to impose additional unbundling or interconnection requirements on Ameritech Illinois, those obligations must be implemented through interconnection agreements, not tariffs.

Second, we agree with Ameritech Illinois in its analysis that we must refrain from imposing additional unbundling obligations in the context of a tariff proceeding because the Supreme Court has consistently held that federal law preempts state action that conflicts not only with substantive federal standards, but also with the procedural or administrative framework established by a federal statute – such as the Act's mandate that unbundling and interconnection obligations be implemented through interconnection agreements. In such cases, the Supreme Court "ha[s] been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). This is because "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971) (internal quotation marks omitted). In other words, "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy," and therefore is equally subject to preemption. *Ibid*.

This principle is especially important where Congress, in asserting federal supremacy in an area of law, "did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties," but also created "specially designed procedures" designed "to obtain uniform application of its substantive rules and to avoid th[ose] diversities and conflicts likely to result from a variety of local procedures." *Ibid.* In such cases — and the Act clearly presents such a case — "Congress plainly meant to do more than simply to alter the then-prevailing substantive law," but "sought as well to restructure fundamentally the processes for effectuating that policy." *Ibid*.; *see also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999) ("IUB II").. Thus, "[t]he technique of administration and the range and nature of those remedies that are and are not available [under a particular federal statute] is a fundamental part and parcel of the operative legal system," and state action that conflicts with or undermines that "technique of administration" is preempted. *Lockridge*, 403 U.S. at 287 (emphasis added).

The Act's "technique of administration" (*i.e*., the creation of individualized interconnection agreements) and the "range and nature of those remedies that are . . . available" (i.e., exclusive federal court review) is a "fundamental part" of the Act's regulation of telecommunications. Congress' choice of interconnection agreements as the exclusive vehicle for implementing the Act's local competition provisions is every bit as important as the Act's substantive requirements. At a minimum, it clearly would be contrary to federal law for this Commission to use state tariffs, rather than interconnection agreements, to implement additional unbundling obligations.

Moreover, allowing state commissions to impose additional unbundling obligations via tariffs likely would nullify the Section 252 negotiation process. If CLECs were permitted to simply opt into state-mandated tariffs that imposed such additional unbundling obligations, this would effectively eliminate the need for negotiations by providing CLECs with an alternative method for obtaining such unbundling. Indeed, it is no exaggeration to say that *requiring* ILECs to tariff additional unbundling obligations, and permitting CLECs to order items "off the rack," would render section 252 meaningless in Illinois. There would be little point to spending 135-160 days negotiating an interconnection agreement with a CLEC, and then arbitrating the disputed issues, if at any time in the future the CLEC could simply unilaterally abrogate the agreement and take a different or conflicting term or condition from a tariff. '

Third, under federal and state law, our authority is limited to determining whether Ameritech Illinois' UNE tariff is consistent with federal law. Specifically, the FCC's *Line Sharing Order* sets forth Ameritech Illinois' obligations with respect to the new HFPL UNE. The *Line Sharing Order* does not require Ameritech Illinois to tariff those obligations. On the contrary, those obligations are to be implemented through the interconnection agreement negotiation and arbitration processes (or through the Statement of Generally Available Terms ("SGAT") process) set forth in Section 252 of the Act, as the *Line Sharing Order* recognizes. *Id.*, ¶¶ 158-160, 167. In other words, if Ameritech Illinois had never filed an HFPL UNE tariff, the Commission could not order Ameritech Illinois to do so. Likewise, if Ameritech Illinois chose to withdraw its HFPL UNE tariff, the Commission could not order Ameritech Illinois to reinstate it. It necessarily follows that, to the extent the Commission has any authority under federal law to review Ameritech Illinois' HFPL UNE tariff, that authority is limited to ensuring that the tariff complies with existing obligations imposed by the applicable federal law, namely, Section 251(c)(3) of the Act and the FCC's rules implementing Section 251(c)(3).

Similarly, under Section 9-201 of the PUA, the Commission is authorized to require changes to a tariff only to the extent that such changes are required to render the tariff "just and reasonable." *See* 220 ILCS 5/9-201. We disagree with Rhythms' and Staff's assertion that Section 9-201 of the PUA gives us virtually unlimited discretion to determine what constitutes just and reasonable tariff provisions. Indeed, putting aside momentarily the preemptive effect of the 1996 Act (as confirmed by the U.S. Supreme Court in *IUB II*), most of the provisions of the PUA on which Rhythms and Staff rely are entirely inapposite, because those provisions relate to a telecommunications carriers obligations to provide *services*, *not* to an incumbent LEC's obligations to unbundle its *network elements*. As explained above, this Commission is authorized to require changes to a tariff *only* to the extent that such changes are required to render the tariff "just and reasonable." Because Ameritech Illinois' HFPL UNE tariff is a voluntary filing that provides CLECs with an UNE offering that they could not otherwise obtain via tariff, and because it implements federal law requirements that already incorporate a "just and reasonable" standard (*see* 47 USC § 251(c)(3)), we must conclude that Ameritech Illinois' HFPL UNE tariff is "just and reasonable" so long as that tariff complies with existing, applicable federal law—which in this case is the FCC's *Line Sharing Order*.

In any event, we do not believe that the vast majority of the changes to the tariff proposed by the CLECs even fall within the tariff review authority granted to us by Section 9-201 of the

PUA. Most of the CLECs' proposed changes would add entirely new unbundling obligations to, and radically transform the product definition and provisioning processes for, Ameritech Illinois' HFPL UNE offering. The test under Section 9-201 is whether Ameritech Illinois' proposed HFPL UNE tariff would be unjust or unreasonable absent the changes proposed by the CLECs.

For the above three reasons, this Commission does not have authority to impose new unbundling obligations on Ameritech Illinois in the context of this tariff proceeding. Even if we did have such authority, we could not impose the particular unbundling requirements requested by the CLECs in this case. More specifically, a state commission cannot collaterally attack FCC rulings that implement the Act's unbundling rules. Yet that is exactly what the CLECs' additional unbundling proposals — in particular, Rhythms' proposal that the Commission require Ameritech Illinois to unbundle its Project Pronto network and AT&T's proposal that the Commission require Ameritech Illinois to unbundle its splitters — would have this Commission do. The FCC has specifically declined to authorize the additional unbundling that the CLECs seek here. This Commission should not — and legally cannot — impose on Ameritech Illinois further unbundling obligations that the FCC has refused to impose. Significantly, the CLECs, by seeking rehearing of the *UNE Remand Order*, the *Line Sharing Order* and the *Project Pronto Order*, have already conceded that what they seek is not currently required by the FCC. Collateral attacks on FCC orders that are subject to direct review are not permitted under the governing law. *FCC v. ITT World Comm., Inc*., 466 U.S. 463, 468 (1984); *Wilson v. A.H. Belo, Inc*., 87 F.3d 393, 399-400 (9th Cir. 1996); *Michigan Bell Tel. Co. v. Strand*, 26 F.Supp.2d 993 (W.D. Mich. 1999). Rather, the only proper way to challenge an FCC determination is to seek rehearing and then, if necessary, take a direct appeal from the FCC's decision under the Hobbs Act (28 U.S.C. § 2342(1)).

Moreover, as a matter of policy, it would not be beneficial for this Commission to impose additional unbundling obligations in instances where, as here, the incumbent LEC voluntarily files a UNE tariff to provide CLECs with an additional way of obtaining a UNE that otherwise would not be available to them We will refrain from imposing new unbundling obligations as part of that tariff. Indeed, if we were to do otherwise, it only would discourage Ameritech Illinois and other incumbent LECs from voluntarily filing additional UNE tariffs in the future that could be beneficial to CLECs.

Moreover, even if we were to conclude that our authority is not constrained in this manner, our ultimate conclusions in this case would not change. State commissions are allowed to add elements to the FCC's national list of elements required to be unbundled only in limited circumstances. *UNE Remand Order*, ¶154; 47 U.S.C. 251(d)(3). Specifically, any new unbundling obligations must meet the "necessary" and "impair" test of Section 251(d)(2), as well as the requirements of Section 261(c).

As the Supreme Court made clear in *IUB II*, Section 251(d)(2) of the Act imposes real, concrete limits on the ability of the FCC (and any state commission) to order the unbundling of any network elements by incumbent LECs. That is, before the FCC or a state commission can order the unbundling of any ILEC network elements, it must determine, based on a comprehensive, fact-based market analysis, that such unbundling satisfies the "necessary" and "impair" test of Section 251(d)(2). Proper application of the necessary and impair standard

requires a fact intensive analyses that considers the totality of the circumstances, and cannot be conducted based on conclusory, generalized CLEC allegations of a business need for a particular network element or elements to be unbundled. Nor can such analyses rely on CLEC claims that it would be more costly to provide service absent that additional unbundling that they seek. *See UNE Remand Order*, at 62, 142; *IUB II*, 525 U.S. at 389-392. The *UNE Remand Order* (at ¶¶72, 89, 96, 97, 99) sets forth various factors that are helpful in applying the necessary and impair standard, including: cost, timeliness, quality, ubiquity, and impact on network operation.

Notably, under Section 9-201 of the PUA, Ameritech Illinois has the burden only to prove that its HFPL UNE tariff is just and reasonable. As *IUB II* makes clear, Section 251(d)(2)—and correspondingly FCC Rule 317—places the burden of proof on the requesting carrier to affirmatively establish by objective, market-based evidence that the additional unbundling they seek satisfies the requirements of Section 251(d)(2). And the Supreme Court also has held that, in order to satisfy this burden, a mere showing or assertion by the CLEC that a failure to unbundle would increase the CLEC's financial or administrative costs is not sufficient. *IUB II*, 525 U.S. at 389-392.

Section 251(d)(2) states that "[i]n determining what network element should be made available for purposes of subsection 251(c)(3), the Commission shall consider, at a minimum" the "necessary" and "impair" standards." In addition to the necessary and impair standards, the Act permits other factors to be weighed in an unbundling analysis that are consistent with the objectives and the Act. The FCC has held that factors to be considered include: (1) rapid introduction of competition in all markets; (2) promotion of facilities-based competition, investment and innovation; (3) reduced regulation; (4) certainty in the market; and (5) administrative practicality. *UNE Remand Order*, §§ 101-116.

Before establishing additional unbundling obligations, this Commission also must consider Section 261(c) of the Act. Section 261(c) of the Act mandates that a state-imposed requirement (1) must be "necessary" to "further competition in the provision of telephone exchange service or exchange access," and (2) must not be "inconsistent" with the Act or "the Commission's regulations to implement this part." The requirements of Section 261(c) are mandatory, and are incremental to the requirements of Sections 251(d)(2) and 251(c)(6) of the Act. The "necessary" standard must be given substance, and the Commission cannot regard any increased cost or decreased service quality as creating a necessity. *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 736 (1999).

We disagree with Staff's assertion that this Commission can add elements to the FCC's national list of UNEs if doing so is in compliance with Sections 251(d)(3)(B) and (C) of the Act. Staff cites the wrong provisions of the Act. Sections 251(d)(3)(B) and (C) address the *FCC*'s authority to affirmatively preempt certain *pre-existing* state laws, not the ability of a state Commission to impose new unbundling obligations that go beyond existing federal law requirements. As indicated above, the relevant Section of the Act addressing the scope of a state commission's authority in such circumstances is in Section 261(c) of the Act.

We also disagree with Rhythms' and Staff's assertion that Section 9-201 of the PUA gives us virtually unlimited discretion to determine what constitutes just and reasonable tariff

provisions. Indeed, the provisions of the PUA on which Rhythms and Staff rely (including Section 13-505.6) are entirely inapposite, because those provisions relate to the obligations of a telecommunications carrier that provides both competitive and noncompetitive services to provide on an unbundled basis its *end-to-end noncompetitive services*, *not* to an incumbent LEC's obligations to unbundle its *network elements*. This Commission is authorized to require changes to a tariff *only* to the extent that such changes are required to render the tariff "just and reasonable." Because Ameritech Illinois' HFPL UNE tariff is a voluntary filing that provides CLECs with an UNE offering that they could not otherwise obtain via tariff, and because it implements federal law requirements that already incorporate a "just and reasonable" standard (*see* 47 USC § 251(c)(3)), the Commission must conclude that Ameritech Illinois' HFPL UNE tariff is "just and reasonable" so long as that tariff complies with existing, applicable federal law—which in this case is the FCC's *Line Sharing Order*.

II. UNBUNDLED ACCESS TO PROJECT PRONTO FACILITIES AND COLLOCATION OF CLEC LINE CARDS IN PROJECT PRONTO NGDLCS

The HEPO's recommended Commission Analysis and Conclusion Section on pages 15-17, 19-20 should be replaced with the following:

Commission Analysis and Conclusion:

For the reasons set forth by Ameritech Illinois, we conclude that the CLECs' Project Pronto UNE/line card collocation proposal conflicts with the law and therefore is rejected. Specifically, the proposal to allow Rhythms and Covad to virtually collocate line cards in Project Pronto NGDLCs, and the resulting *de facto* creation of new Project Pronto-related unbundling obligations, is unlawful, and would be bad policy, for the following reasons: *First*, the proposal would require Ameritech Illinois to unbundle packet switching functionality in direct conflict with the *UNE Remand Order*, and therefore is preempted under federal law. *Second*, the proposal does not satisfy the necessary and impair standards established by Section 251(d)(2) of the Act. *Third*, the proposal conflicts with the FCC's national policy framework established in the FCC's *Project Pronto Order*, and therefore is preempted by federal law. *Fourth*, the proposal unlawfully requires Ameritech Illinois to create new combinations of network elements for CLECs. *Fifth*, the proposal does not satisfy the requirements of Section 261(c) of the Act. *Sixth*, the proposal does not meet the collocation standards set forth in Section 251(c)(6). *Seventh*, the proposal threatens to unlawfully require Ameritech Illinois to build new facilities or provide superior quality service to CLECs, in violation of *IUB I* and *IUB III*. *Eighth*, the proposal does not represent good policy and would disserve the public interest.

a. THE UNE REMAND ORDER

Significantly, any requirement to unbundle the bulk of the Project Pronto network directly conflicts with the *UNE* Remand *Order*. The "Project Pronto UNE" or UNEs would include, among other things, the packet switching functionality of the NGDLC and the OCD. The OCD is an ATM switch. *Project Pronto Order*, ¶18. Among other things, the NGDLCs being deployed by Ameritech Illinois under Project Pronto digitize the data signals received over the copper subloop from a DSL subscriber and "packetize" those digitized signals into "cells" for transmission to the OCD at the Central Office. ATM switches are packet switches. *Id.*; *see also*

UNE Remand Order, ¶303. The FCC held in the *UNE Remand Order* that an ILEC is not required to provide packet switching as a UNE as long as the ILEC allows CLECs to collocate their DSLAMs in the ILEC's Remote Terminals (or meets other criteria), which Ameritech Illinois does. *UNE Remand Order*, ¶ 313; 47 C.F.R. 51.319(c)(4)-(5). In other words, the FCC has now "made an affirmative finding as to whether or not the [packet switching network element] satisfies the unbundling standards of the Act as clarified by the Supreme Court" (*UNE Remand Order*, ¶ 157) and held that in all but exceptional circumstances (that do not apply to Project Pronto), it does not.

Specifically, the FCC's rules provide that:

> (B) An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability *only where each of the following conditions are satisfied*:
>
> > (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault);
> >
> > (ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;
> >
> > (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b); and
> >
> > (vi) The incumbent LEC has deployed packet switching capability for its own use.

47 C.F.R. 51.319(c)(3)(B). The record establishes that the four conditions described in the FCC's rules will normally not exist in Ameritech Illinois' network, including any Project Pronto facilities that it deploys, for several reasons. *First*, copper loops will often be available to the CLECs. The deployment of Project Pronto does not displace any existing copper loops, and, in fact, will usually free up working copper loops for future CLEC use. *Second*, Ameritech Illinois has committed to permit CLECs to collocate their DSLAMs in or adjacent to all of its Remote Terminals, both existing and future RTs. Ameritech Illinois' voluntary commitments, adopted as conditions in the FCC's *Project Pronto Order* (at ¶¶ 34, 35, 61) permits CLECs to collocate their own DSLAMs at or near the Ameritech Illinois' RT sites. Specifically, Ameritech Illinois will, upon a CLEC's request, either increase the size of future RT structures or provide the CLEC with an adjacent cabinet structure. *Third*, Ameritech Illinois is not deploying packet switching

equipment for its own use. Instead, the Project Pronto NGDLC and OCD are being deployed by Ameritech Illinois for CLECs' use in provisioning their own retail DSL services to end users.

We cannot ignore or nullify the FCC's packet switching determination by ordering the unbundling of the Project Pronto network, including the packet switching functionality of the OCD and the NGDLC. *See IUB II*, 525 U.S. at 378 n.6 (under the 1996 Act, state commissions must regulate "in accordance with federal policy" and the FCC has authority to "draw the lines to which [state commissions] must hew"). The FCC drew the line on packet switching in the *UNE Remand Order*, and this Commission is not free to erase it. As the Supreme Court put it, any system that allowed state commissions to ignore the FCC's "affirmative finding as to whether or not the particular element now satisfies the unbundling standards of the Act" (*UNE Remand Order*, ¶ 157) would be "surpassing strange." *See IUB II*, 525 U.S. at 378 n.6. A Project Pronto UNE/line card collocation requirement would be unlawful, because where the FCC has specifically determined that a network element does not meet the unbundling requirements of the Act and federal rules, its decision is the "national framework" that "draw[s] the lines to which [state commissions] must hew." *Id*.

In short, the CLECs' Project Pronto UNE/line card collocation proposal directly conflicts with the FCC's determination that packet switching functionality does not satisfy the Act's "necessary" and "impair" standards and hence should not be unbundled, except in limited circumstances not applicable here. Adoption of their proposal is therefore preempted and precluded by controlling federal law. *Geier v. American Honda Motor Co*., 120 S. Ct. 1913, 1921 (2000).

b. THE "NECESSARY" AND "IMPAIR" STANDARDS

This Commission cannot unbundle Project Pronto and allow collocation of line card because the necessary and impair standard has not been met. As a necessary predicate for a requirement that Ameritech Illinois allow CLECs to collocate their own line cards in Project Pronto NGDLCs, we would have to create one or more new "Project Pronto UNEs" or UNE combinations. As both a physical and functional matter, these new UNE or UNE combinations would comprise the entire Project Pronto network, minus the line cards. They therefore would include, among other things, "the subloop element between the central office and the remote terminal" and a "port" on the OCD in the central office, which is an ATM packet switch that aggregates traffic from several remote terminals. See *Project Pronto Order*, ¶¶ 4 and nn.11-12, 31. Neither of these has ever been required as a UNE by the FCC, which means that we could only define them as some kind of conglomerate UNE or UNE combination (including all the other packet switching functionality of the Project Pronto network) pursuant to the authority delegated by Congress and the FCC.

More specifically, we would have to conduct a fact-intensive inquiry to determine whether the proposed UNE meets the governing legal standards, that is, the "necessary" and "impair" tests of Section 251(d)(2) of the Act and FCC Rule 317. 47 C.F.R. 51.317(b)(4) ("[A] state commission must comply with the standards set forth in this § 51.317 when considering whether to require the unbundling of additional network elements."). Section 251(d)(2) and FCC Rule 317 require a "fact intensive" analysis that "consider[s] the totality of the circumstances,"

including market conditions and the availability of alternatives to the UNE, to determine whether, among other things, lack of access to the UNE will "materially" diminish CLECs' ability to provide the services they seek to offer. *UNE Remand Order*, ¶¶ 62, 142.

Significantly, *IUB II* makes clear that Section 251(d)(2) of the Act – and correspondingly FCC Rule 317 – places the burden of proof on the *requesting carrier* to affirmatively establish by objective, market-based evidence that the unbundling they seek satisfies the requirements of Section 251(d)(2). Specifically, the Supreme Court stated: "Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *IUB II*, 525 U.S. at 392 (emphasis added). And the Supreme Court also has held that, in order to satisfy this burden, a mere showing by the CLEC that a failure to unbundle would increase the CLEC' s financial or administrative costs is not sufficient. *Id*. at 389-392.

None of the CLECs seeking to have this Commission impose additional unbundling obligations on Ameritech Illinois have met this rigorous standard. Indeed, the only evidence presented in this proceeding is unsupported assertions that the CLECs will be competitively harmed, or will face increased costs (which the Supreme Court has held is insufficient to satisfy the burden of proof). In short, the record contains none of the types of information necessary to conduct the "fact intensive" review required by law. In fact, the only relevant evidence shows that Ameritech Illinois will offer meaningful alternatives to the "Project Pronto UNE" by, among other things, providing CLECs with wholesale Broadband Services for data service and for combined voice and data services, both at UNE rates. See *Project Pronto Order*, App. A. Those services will enable CLECs to make use of facilities and to access features and functions that are not required to be unbundled at all, and will make them available much more quickly than would otherwise be possible, thereby enhancing and accelerating CLECs' ability to provide competitive advanced services. See *Project Pronto Order*, ¶¶ 2, 23, 41-43, 45-46. Unless and until a proposed new UNE passes the tests of Rule 317 based on a fully developed record and intensive factual analysis, we have no power to require an incumbent LEC to provide it. 47 C.F.R. 51.317(b)(4).

In addition, the *UNE Remand Order* (at ¶¶ 101-115) sets forth several policy factors which are incremental to the above legal requirements and may be considered when making an unbundling determination. These factors include whether the unbundling requirement would: (1) promote rapid introduction of competition in all markets; (2) promote facilities-based competition, investment and innovation; (3) reduce regulation; and (4) promote certainty in the market. Consideration of these policy factors only reconfirms that Ameritech Illinois should not be required to unbundle Project Pronto.

First, creation of yet another unbundled network element or group of unbundled network elements will not result in reduced regulation.

Second, additional regulation will impair the rapid introduction of competition in all markets. Ameritech Illinois' Broadband Services Offering will drastically increase the potential

markets for data CLECs. As a result of this Broadband Services Offering, data CLECs will be able to reach millions of customers that they could not efficiently or economically reach before. The Broadband Services Offering also reduces the amount of up-front capital required for a CLEC to begin providing data service to a new community, by minimizing the amount of collocation required and eliminating the need to purchase DSLAMs. Any additional regulatory burden placed upon Ameritech Illinois' deployment of Project Pronto has the potential to slow, or potentially stop, the roll-out of Project Pronto and the Broadband Services Offering in Illinois, which could limit the new competitive options for data CLECs that Project Pronto otherwise would create.

Third, burdensome regulation of Ameritech Illinois' deployment of Project Pronto will discourage facilities-based competition, investment, and innovation by ILECs and CLECs alike. Ameritech Illinois' investment in Project Pronto is unprecedented. In providing a new Broadband Services Offering that enables lower capital investment by CLECs seeking to provide data services, Ameritech Illinois is providing facilities-based data services providers with an *additional* option for providing DSL service and competing in the advanced services market, which would not otherwise exist. Not only does Ameritech Illinois' Broadband Services Offering expand the potential market for all data CLECs, it also allows data CLECs to enter the market more quickly by lowering the initial cost of entry. The Act seeks to promote exactly the type of innovative investment in network facilities that Ameritech Illinois is undertaking through Project Pronto. Future innovations and investment decisions by Ameritech Illinois and by other ILECs around the country obviously will take into account how Ameritech Illinois' investment in Project Pronto is supported by regulators or made burdensome and unattractive. Regulators should encourage ILECs to go beyond the requirements of the Act to develop new, innovative products for wholesale customers, such as Ameritech Illinois' Broadband Services Offering. As ILECs become free to work cooperatively with CLEC customers in the development of mutually beneficial product offerings, true competition will bloom and flourish. However, if voluntary offerings of ILECs become onerous regulatory obligations, competition will be stifled and innovation will be discouraged.

Fourth, creation of yet another set of UNEs will not promote certainty in the market. One of the goals of the *UNE Remand Order* was to create stability in the market by letting ILECs and CLECs alike know what the ILECs' unbundling requirements are today and what they will be in the future. To this effect, the FCC stated in *UNE Remand Order*:

> The new standards and framework we adopt in the Order for determining which network elements incumbent LECs must make available on an unbundled basis will remove the uncertainties surrounding the incumbent's unbundling obligations since passage of the Act. More importantly, however, they will define the competitive landscape of telecommunications markets for the foreseeable future.

UNE Remand Order, ¶ 4. A stable set of unbundled elements is a fundamental requirement for ILECs making network investment and product development decisions. This is particularly true in the case of the development of innovative new products designed to be marketed solely to CLECs, as opposed to end-user customers. If ILECs have no assurance that their voluntary investment of funds and work efforts to market a new product or service to CLECs will not turn

into a new UNE obligation, those ILECs will be discouraged from pursuing similar investments and innovation in the future.

The foregoing analysis of these policy factors only confirms that the necessary and impair standards have not been met and that the CLECs' Project Pronto proposal is unlawful.

We disagree with the CLECs' claim that traditional line sharing options are insufficient. More specifically, the CLECs assert that, absent unbundling, Project Pronto will eliminate their ability to provide DSL services to end users. This simply is not supported by the record. All the traditional line sharing options that CLECs have available to them today will continue to exist once Project Pronto is overlaid on the network. Accordingly, Project Pronto will not eliminate or impair the CLECs' ability to provide DSL services to end users.

We also disagree with the CLECs' assertion that their ability to provide DSL service will be impaired if their Project Pronto UNE/line card collocation proposal is not adopted, because it is purportedly impracticable to collocate DSLAMs at RTs. Again, the evidence proves the contrary. In fact, the CLECs themselves have acknowledged that collocation at the RT is technically and economically feasible, when they *successfully* asked for the FCC, in the *Project Pronto Order* proceedings, to (1) clarify that Section 251(c)(2) imposes an independent obligation on SBC ILECs to permit technically feasible interconnection at RTs and other intermediate loop concentration or connection points and (2) require that all new RTs be designed to accommodate collocation by at least five competitive local exchange carriers. Clearly, if the CLECs did not believe that RT collocation was economically feasible, they would not have asked the FCC to make the above findings. Moreover, the FCC presumably would not have imposed the RT collocation requirements that it did impose as part of the *Project Pronto Order* conditions, if such collocation was not feasible.

Similarly, the CLECs' assertion that they will not be able to use Central Office-based copper loops to provide DSL service once Ameritech Illinois deploys its Project Pronto DSL facilities because of alleged "cross-talk" problems is equally without merit and is purely speculative. Although the issue of potential "cross talk" problems is being considered by the T1E1 committee of the Alliance for Telecommunications Industry Solutions ("ATIS") and by the National Reliability and Interoperability Council, no regulatory or industry body has concluded that such a problem will in fact occur. Moreover, even if such "cross-talk" problems are found to potentially exist, there is nothing to suggest that a solution would not be found. Significantly, if potential problems were found to exist, the same problem would exist every time a CLEC collocated a DSLAM at an RT. In other words, the problem would arise from CLECs' as well as ILECs' placement of facilities at an RT and would affect all DSL providers equally. Accordingly, the industry likely would find a solution.

c. THE NATIONAL POLICY FRAMEWORK

The CLECs' Project Pronto UNE/line card collocation proposal conflicts with the Act and the national framework for promoting advanced service deployment and competition. Under well-established principles of law, state regulation is preempted where it "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress' — whether that 'obstacle' goes by the name of 'conflicting; contrary to;…repugnance; difference;

irreconcilability; inconsistency; violation; curtailment;…interference,' or the like." Geier v. American Honda Motor Co., 120 S. Ct. 1913, 1921 (2000) (ellipses in original) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). As the FCC recently noted, "[a]mong the fundamental goals of the Telecommunications Act of 1996 . . . is the promotion of innovation, investment and competition among all participants and for all services in the telecommunications marketplace, including advanced services." *In the Matter of* Deployment *of Wireless Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, FCC 99-413 (rel. December 23, 1999) (citing Joint Statement of Managers, S. Conf. Rep. 104-230, 104th Cong. 2d Sess 1 (1996)).

The *Project Pronto Order* provides the current national framework for promoting advanced services deployment and competition. The FCC has determined that allowing the SBC ILECs to own and control line cards used with Project Pronto NGDLCs is in the public interest and is the best means for promoting advanced services deployment and competition, provided that the SBC ILECs offer CLECs end-to-end wholesale Broadband Services over the Project Pronto facilities and satisfy other pro-competitive commitments. *Project Pronto Order*, ¶¶ 1-2.

More specifically, the FCC expressly found in its *Project Pronto Order* that "allowing SBC's incumbent LECs to own, install, and operate" the line cards used with Project Pronto NGDLCs, subject to the terms and conditions set forth in the Order, will promote the pro-investment and pro-competitive objectives of the Act set forth above. *Project Pronto Order*, ¶¶ 1-2, 10. In particular, the FCC concluded that ILEC ownership and control over line cards would "speed the deployment of ADSL service availability to 77 million customers" across the country, while at the same time giving CLECs an "immediate opportunity to compete against SBC in the mass market," including by "differentiating their product offerings." *Id.*, ¶ 23. The FCC further added that the "immediate deployment of advanced services to consumers in SBC's regions . . . provides a significant benefit that we believe must be considered in our public interest analysis." *Id*. And the FCC also expressly found that allowing SBC ILECs to own and control line cards "should affirmatively and identifiably promote the rapid deployment of advanced services in a pro-competitive manner, thereby serving the goals of section 706." *Id.* As the FCC explained, its line card ruling "paves the way for Rhythms and other carriers to compete" for the estimated 20 million potential customers who would not be able to receive DSL service but for SBC's voluntary – and discretionary – decision to roll out Project Pronto at this time. *Id*., ¶ 28. Finally, the FCC emphasized the "wide array of choice" that will be available to consumers "[b]y unleashing the full potential of the [Project Pronto] equipment" and the "innovative, exciting new services" that SBC and competing LECs will provide in the years to come. *Id*., ¶ 42, 45.

The FCC's *Project Pronto Order* establishes as a matter of federal law that ILEC ownership and control of line cards, when coupled with the speedy deployment of Project Pronto and the pro-competitive commitments made by the SBC ILECs in connection with such ownership, affirmatively promotes the achievement of Congress' purposes and objectives under the Act. Indeed, if the FCC thought otherwise – *i.e.*, if the FCC thought that ILEC ownership of line cards were neutral or negative with respect to the accomplishment of Congress' goals – the FCC would not have found that waiver of the Merger Order conditions to permit ILEC ownership of line cards serves the public interest and promotes innovation and competition.

The CLECs' proposal takes an approach to advanced services competition that is directly at odds with the approach in the FCC's rulings, and therefore is pre-empted. Indeed, the Project Pronto UNE/line card collocation proposal clashes head on with the FCC's controlling decision that, on the whole, the Act's purposes are best served if the SBC ILECs are allowed to own those line cards. The proposal therefore stands "as an obstacle to the accomplishment of the purposes and objectives of Congress" and is preempted under established Supreme Court doctrine. More specifically, if this Commission were to require Ameritech Illinois to permit collocation of CLEC line cards, the Commission would effectively nullify the waiver granted by the FCC. Indeed, if the CLECs are allowed to collocate their own line cards, the ILECs certainly would not be owning and controlling line cards, as permitted by the FCC's waiver.

Although the CLECs deny that the *Project Pronto Order* implicitly rejected their line card collocation proposal, we disagree. The FCC expressly declined to adopt the CLECs' line card collocation proposal, which the CLECs had specifically urged the FCC to impose in numerous *ex partes* that those CLECs filed with the FCC in the *Project Pronto* proceeding. Instead, the FCC found in its *Project Pronto Order* that "allowing SBC's incumbent LECs to own, install, and operate" the line card used with Project Pronto NGDLCs, subject to the terms and conditions set forth in the Order, would promote the pro-investment and pro-competitive objectives of the Act set forth above. *Project Pronto Order,* paras. 1-2, 10.

If this Commission were to require Ameritech Illinois to permit collocation of CLEC line cards in Project Pronto NGDLCs, the Commission would effectively nullify the waiver granted by the FCC. Simply put, if the CLECs are allowed to collocate their own line cards, Ameritech Illinois certainly would not be owning and controlling those line cards, as permitted by the FCC's waiver. The conclusion that the FCC failed to adopt the CLECs' collocation proposal is confirmed by the fact that the CLECs are requesting reconsideration from the FCC on the very same collocation proposal that they are advocating in this case. *See, Petition For Reconsideration Of Competitive Telecommunications Association ,* CC Docket No. 98-141, ASD file No. 99-49 (filed October 10, 2000) Clearly, such a request for reconsideration would not be necessary if the FCC had left the door open for CLECs to own and collocate line cards to be used in the Project Pronto architecture, as the CLECs suggest in this case. The CLECs are simply forum shopping in the hope that we will reach a different decision than the FCC. In short, the Project Pronto UNE/line card collocation proposal clashes head on with the FCC's controlling decision that, on the whole, the Act's purposes are best served if the SBC ILECs are allowed to own the Project Pronto NGDLC line cards. The proposal therefore must be rejected because it is plainly inconsistent with the FCC's national policy framework.

As a legal matter, the Commission cannot impose on Ameritech Illinois further unbundling obligations that the CLECs, by seeking rehearing of the *UNE Remand Order*, the *Line Sharing Order* and the Project *Pronto Order,* have already conceded are not currently required by the FCC. Collateral attacks on FCC orders that are subject to direct review are not permitted under the governing law. *FCC v. ITT World Comm., Inc*., 466 U.S. 463, 468 (1984); *Wilson v. A.H. Belo, Inc*., 87 F.3d 393, 399-400 (9th Cir. 1996); *Michigan Bell Tel. Co. v. Strand*, 26 F.Supp.2d 993 (W.D. Mich. 1999).

Additionally, from a policy perspective, it would be unwise for the Commission to rule on these issues when the FCC is still evaluating them. The CLECs have already sought reconsideration from the FCC on these issues and, in fact, that is the only lawful way for them to challenge the FCC's determination. The Commission should not allow the CLECs to forum shop by bringing those issues to this Commission in the hope that we will give them something that the FCC already has declined to give them. Even worse, the CLECs are bringing their claims here even though the FCC is currently considering their proposals for additional unbundling in connection with the CLECs' petitions for reconsideration and with separate, pending, further proposed rulemaking proceedings.

The Act's savings clauses does not change our conclusion. Those savings clauses mandate that any state regulation of line cards must be "consistent" with – or, put another way, "not inconsistent" with – the Act. 47 U.S.C. 251(d)(3), 261(c). The Supreme Court recently admonished courts not to "give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law" and further emphasized that savings clauses do not "bar the ordinary working of conflict preemption principles." Geier, 120 S. Ct. at 1919; *Cahnmann v. Sprint Corp*., 133 F.3d 484, 488 (7th Cir. 1998) (Posner, C.J.) ("interpretations [of savings clauses] that would empower state courts to gut the federal regulatory scheme . . . are therefore rejected"). Strict adherence to that principle is especially appropriate where, as here, the text of the savings clauses expressly limits the states to regulatory measures that are consistent with the federal Act. Because the FCC has expressly ruled that allowing ILECs to own line cards is in the public interest and best serves the goal of promoting advanced services competition, we have no authority to impose a new unbundling obligation that undermines the FCC's ruling under the guise of implementing FCC policy.

d. *IUB I* AND *IUB III*--COMBINATIONS.

(i) VIRTUAL COLLOCATION

Allowing CLECs to virtually collocate Project Pronto NGDLC line cards directly conflicts with the Eighth Circuit's holding in *IUB I and III* that incumbent LECs cannot be required to create new UNE combinations for CLECs. Accordingly, we cannot allow such virtual collocation.

Specifically, a virtual collocation requirement unlawfully forces Ameritech Illinois to affirmatively create new combinations of UNEs on CLECs' behalf, as Ameritech Illinois would be required to combine the CLECs' NGDLC line cards with the unbundled subloop and the unbundled OCD/NGDLC/lit fiber combination in order to create an end-to-end combination of UNEs capable of supporting DSL services. Indeed, the facilities that would make up the end-to-end combination of network elements are, by definition, necessarily *not* pre-combined with the CLEC's NGDLC line card. Rather, in order to create the end-to-end combination capable of supporting DSL services, the CLEC's line card must be installed into the NGDLC RT equipment. In other words, a NGDLC line card virtual collocation requirement would improperly require Ameritech Illinois to affirmatively combine its network elements with *CLEC-owned* line cards.

The Eighth Circuit could not have stated more clearly, in vacating FCC Rules 315(c)-(f), that "Congress has directly spoken on the issue of who shall combine previously uncombined network elements" and required competing LECs to perform that task. *IUB III*, 219 F.3d at 759 (citing 47 U.S.C. ? 251(c)(3)). In *IUB I*, the Eighth Circuit held that Section 251(c)(3) of the Act "unambiguously indicates that requesting carriers will combine the unbundled elements themselves" and that the language of that section "can[not] be read to levy a duty on the incumbent LECs to do the actual combining of elements." 120 F.3d at 813. As the court put it, "the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves." *Id.* The Eighth Circuit was equally emphatic in *IUB III*, finding that "Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall 'combine such elements.'" *IUB III*, 219 F.3d at 759. The court therefore held that the FCC's attempt to impose a new combinations requirement was impermissible because it "violate[d] the plain language of the statute." *Id.*

The Eighth Circuit's decisions are binding on every carrier and state commission nationwide by virtue of the Hobbs Act. Under the Hobbs Act (28 U.S.C. ? 2342(1)), the Eighth Circuit had exclusive jurisdiction to determine the legality of the FCC's attempt to require incumbent LECs to provide new combinations. The Hobbs Act "avoids the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issues" (*Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 907 (8th Cir. 1984), vacated on unrelated grounds, 476 U.S. 1167 (1986)), by consolidating all petitions for review of FCC orders interpreting and/or implementing the Act in a single court of appeals. As the Supreme Court has made clear, the Hobbs Act's jurisdictional preclusion is broad. It not only bars direct review of an agency's interpretation of the governing statute in courts other than the designated Hobbs Act court of appeals, but also forbids indirect review of such agency action. *See FCC v. ITT World Comm., Inc*., 466 U.S. 463, 468 (1984); *Wilson v. A.H. Belo Corp*., 87 F.3d 393, 399-400 (9th Cir. 1966); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

The fact that the Eighth Circuit's holding in *IUB I* and *IUB III* is binding on the FCC and the states is confirmed by the federal District Court for the Western District of Michigan's decision on December 5, 2000, in *Verizon North, Inc. v. Strand*, File No. 5:98-CV (W.D. Mich. Dec. 5, 2000). In this case, the court overturned the state commission's decision ordering Verizon North to offer unbundled network elements as combinations of platforms at a CLEC's request. Relying on the Eighth Circuit's decision in *IUB III*, the court held that any state requirement that an ILEC combine UNEs for CLECs is preempted by the Act. Specifically, the court rejected the Michigan commission's theory that *IUB III* "does not prohibit the combination of unbundled network elements, but rather only holds that combinations are not required by the FTA," finding that this argument rested on a "mistaken interpretation" of the law. *Verizon North*, slip. op. at 13. The court then held:

> Under the FTA it is the duty of requesting carriers, not the incumbent LECs, to combine the elements. *Iowa Utilities III* makes it clear that the FCC cannot insert a bundling requirement consistent with the terms of the FTA. *For the same reasons the state is precluded from imposing such a requirement*. Accordingly,

> the Court finds that the MPSC's order that Verizon providing bundling at the behest of competitive LECs *conflicts with and is preempted by the FTA*."

Id. at 13-14 (emphasis added). For this same reason, we cannot allow CLECs to virtually collocate line cards in Ameritech Illinois' NGDLC RTs. Indeed, such a requirement would require Ameritech Illinois to create new combinations of network elements in violation of the Act.

In short, the Eighth Circuit has held that imposing an affirmative UNE combination requirement on incumbent LECs, such as that inherent in the CLECs' proposal, violates the Act. The Eighth Circuit has drawn the line "to which [state commissions] must hew." *IUB II* at 378 n.6. Any decision by this Commission to the contrary is preempted under *Geier*. 120 S.Ct. at 1919-1920.

(ii) PHYSICAL COLLOCATION

We also could not permit physical collocation of line cards because physical access to the NGDLC systems at remote terminal sites where line cards are installed is akin to giving CLECs direct access to an ILEC's Central Office Main Distribution Frame ("MDF") or Central Office circuit switch, which neither the FCC nor any state commission has ever allowed. Because the line cards of numerous different CLECs as well as Ameritech Illinois all would be placed in the same channel bank assembly at the RT, allowing CLECs to physically install the line cards themselves would necessarily give them access to the line cards of Ameritech Illinois and of all other CLECs. Accordingly, the potential for a CLEC to interfere with or disrupt the service of their competitors, whether inadvertently or otherwise, would be manifest. This type of access has never been allowed by the FCC or any state commission, and will not be allowed here.

e. SECTION 261(c) OF THE ACT.

The CLECs' Project Pronto UNE/line card collocation proposal is unlawful because the record evidence is insufficient to find, as we must under Section 261(c) of the Act, that such a state-imposed requirement is (1) "necessary" to "further competition in the provision of telephone exchange service or exchange access," and (2) not "inconsistent" with the Act or "the Commission's regulations to implement this part." The requirements of Section 261(c) are mandatory, and are incremental to the requirements of Sections 251(d)(2) and 251(c)(6).

With respect to the "necessary to further competition" standard, the courts have consistently treated the term "necessary" in the 1996 Act as having real meaning requiring real analysis, and not as allowing regulators to do as they please while paying mere lip service to the Act. *See IUB II*, 525 U.S. at 391, (1999). Indeed, the Commission must "giv[e] some substance" to the "necessary" requirement of Section 251(d)(2) and cannot regard any "increased cost or decreased service quality" as creating a "necessity." *IUB II* 525 U.S. at 392; *GTE Service Corp. v. FCC*, 205 F3d. 416, 422-23 (D.C. Cir. 2000) (reversing FCC collocation order for failing to give substance to "necessary" requirement of Section 251(c)(6)).

We find the CLECs have not met the heavy burden of demonstrating that their Project Pronto UNE/line card collocation proposal is "necessary to further competition" within the

meaning of Section 261(c). Nor could they, in view of the commitments, including the Broadband Service commitments, made by SBC and incorporated as conditions in the *Project Pronto Order*. Rather, the CLECs merely assert, without any factual support, that they will face higher costs and decreased service quality if Project Pronto is not unbundled. Even assuming that these claims had any record support, they do not support a finding that unbundling Project Pronto is necessary to further competition. To the contrary, the record establishes that the Project Pronto architecture does not have to be unbundled for CLECs to be able to offer DSL services to end users. In the *UNE Remand Order* (at ¶ 307), the FCC stated "the record in this proceeding, and our findings in the 706 Report, establish that advanced services providers are actively deploying facilities to offer advanced services such as xDSL across the country… [C]arriers have been able to secure the necessary inputs to provide advanced services to end users in accordance with their business plans. This evidence indicates that carriers are deploying advanced services to the business market initially as well as the residential and small business markets."

Significantly, Ameritech Illinois' Broadband Service offerings provide CLECs with *new* methods to offer DSL services, in addition to the methods already available to CLECs today. Indeed, CLECs would have several options for offering DSL services, including the following:

(1) The CLECs could utilize Ameritech Illinois' Broadband Service offerings. In doing so, CLECs would be able to utilize the DSLAM functionality of the Project Pronto NGDLC equipment to provide DSL services without having to collocate their own stand-alone DSLAMs at RT sites.

(2) CLECs could also continue to utilize all-copper loops to provide DSL services. Because Project Pronto is an overlay network design, Ameritech Illinois' existing copper facilities would still be available to CLECs. Also, because the Project Pronto architecture would allow an end user's POTS and ADSL service to be provided over that architecture, use of the Broadband Service offerings by other CLECs likely would free additional existing copper facilities that were previously used only for POTS.

(3) CLECs could choose to collocate their own stand-alone DSLAM equipment in Ameritech Illinois' RT sites, where space is available and other technical requirements (e.g., heat dissipation, power, etc.) are met.

(4) CLECs could build their own facilities to provide DSL services to end users.

Given these options, unbundling of Project Pronto clearly does not meet the "necessary" standard of Section 261(c).

With respect to the requirement in Section 261(c) that the state obligation be consistent with the Act and applicable FCC rules, it is equally clear that the CLECs' Project Pronto UNE/line card collocation proposal does not meet this requirement. There are several reasons why the proposal is inconsistent with the Act and the FCC's rules. Specifically, the proposal (1) conflicts with the FCC's holding in the *UNE Remand Order* that ILECs are not required to

unbundle packet switching; (2) conflicts with the FCC's *Project Pronto Order*, which allows ILECs to own, install and operate line cards used with Project Pronto NGDLCs (as described above); and (3) conflicts with the Eighth Circuit's decisions in *IUB I* and *IUB III*, which hold that ILECs are not required to build new facilities for or provide superior quality service to CLECs.

In summary, Section 261(c) limits a state commission's authority to impose additional unbundling obligations on telecommunications carriers beyond those established by federal law to instances where the obligation (1) is necessary to further competition in the provision of telephone exchange service or exchange access and (2) is not inconsistent with the Act and applicable FCC rules. A state law requirement to unbundle Project Pronto does not meet either standard and, therefore, cannot be lawfully imposed by this Commission.

It should be noted that the Commission is not persuaded by the CLECs' argument that their Project Pronto UNE/line card collocation proposal must be accepted because Ameritech Illinois otherwise "would maintain monopoly control over a bottleneck facility." There is absolutely nothing in the record to support such an assertion. To the contrary, after conducting a fact-intensive investigation, the FCC explicitly held that ILECs "do not retain a monopoly position in the advanced services market," which is the only pertinent market here. *UNE Remand Order*, ¶ 308. Likewise, the mere fact that an ILEC owns a facility – especially a facility that in many cases has not yet been deployed – does not automatically make that facility a "bottleneck." Indeed, the FCC certainly would not have allowed the SBC ILECs to own line cards in the *Project Pronto Order* if it viewed them as a true "bottleneck" facility. As the FCC stated, "[m]erely owning and operating equipment used to provide advanced services does not, by itself, evidence a violation of the Act or our rules." *Project Pronto Order*, ¶ 7. Congress and the Supreme Court also have recognized that, rather than assuming all ILEC facilities are bottlenecks, regulators must apply strict prerequisites before they can force the unbundling or sharing of any part of an ILEC's network. *See* 47 U.S.C. § 251(d)(2); *IUB II*, 525 U.S. at 386-92; *see also GTE*, 205 F.3d at 422-23.

Drawing such blind assumptions in connection with Project Pronto is particularly unwarranted and contrary to the FCC's national policy in light of the FCC's express finding that the advanced services market is nascent and emerging for all service providers. *See UNE Remand Order*, ¶¶ 314-17; see also *Project Pronto Order*, ¶¶ 23-24. Indeed, the FCC has specifically adopted a policy of "regulatory restraint" in trying to ensure that regulatory action does not "alter the successful deployment of advanced services." *UNE Remand Order*, ¶ 316. As the FCC explained, "regulatory restraint . . . may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation." *Id.*

In his opinion concurring in part and dissenting in part in *IUB II*, Justice Breyer echoed the FCC's call for "regulatory restraint" in reconciling the Act's sometimes competing goals of competition and innovation. As Justice Breyer observed, "[i]ncreased sharing by itself does not automatically mean increased competition." 525 U.S. at 429 (Breyer, J., concurring on this issue). To the contrary, sharing, unbundling, and combination requirements "require balance," for "[i]t is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge." *Id.* "Regulatory rules that go too far, expanding the

definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may not make the game worth the candle." *Id.* at 430.

In the *Project Pronto Order*, the FCC considered the Act's aims of increasing competition and innovation, and concluded that both goals would best be satisfied if SBC's ILECs own, install, and operate the line cards used to implement Project Pronto. By contrast, the CLECs assume, without any evidentiary support, that permitting ILECs to control the Project Pronto NGDLC line cards will somehow stifle competition. The CLECs also ignore the potential risk that state-imposed sharing requirements may diminish SBC's incentive to deploy Project Pronto in Illinois. *See* IUB II, 525 U.S. at 429 (Breyer, J., concurring on this issue). The Commission may not ignore the FCC's controlling determination in the *Project Pronto Order*. Because the CLECs' Project Pronto UNE/line card collocation proposal directly clashes with the FCC's *Project Pronto Order*, it is rejected.

f. SECTION 251(c)(6)

The CLECs' proposal that Ameritech Illinois allow CLECs to collocate ADLU line cards in Project Pronto NGDLCs is improper because the requirements of Section 251(c)(6) are not satisfied. Section 251(c)(6) allows collocation of only such *equipment* as is "necessary for interconnection or access to unbundled network elements." 47 U.S.C. 251(c)(6). As a preliminary matter, it is necessary to consider the proper interpretation of this standard. The FCC previously interpreted "necessary" to mean merely "used and useful," however, that definition has been rejected by the U.S. District Court. The CLECs request that the Commission adopt an interpretation that "ILECs must permit physical collocation of equipment so long as it is 'directly related to' interconnection and access to unbundled elements and an inability to collocate such equipment would interfere with the CLEC's ability to compete effectively and efficient." This interpretation creates a standard comparable to the "used and useful" standard that the federal court rejected and, accordingly, that interpretation cannot be adopted here. The D.C. Circuit has stated that an ILEC must permit physical collocation of only that equipment that is "directly related to and thus, necessary, required, or indispensable to 'interconnection or access to unbundled network element.'" This is the proper standard to be applied.

The ADLU line card is not the type of equipment that can or should be collocated under the governing rules, nor is the line card "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Specifically, the line card is not a piece of equipment appropriate for collocation because it is only a piece-part or sub-component of a complete item of equipment. As explained by Ameritech Illinois, the FCC's rules require the collocation of only complete items of equipment. Indeed, in each instance where the FCC addresses collocation, it described complete items of network equipment, not piece-parts or sub-components. *Advanced Services Order*, ¶ 28; 47 C.R.C. § 51.323(b). The line card, however, is not a complete item of equipment. Rather, it is merely a subcomponent of an NGDLC, with no stand-alone functionality until it is integrated with the rest of the software and hardware in the NGDLC system. The complete NGDLC physically consists of line cards; additional cards that provide common functions for multiple line cards; hardwired equipment such as the shelves, connectors, and wiring that house and interconnect all of the line cards and common cards; and the system software that makes all the NGDLC RT subcomponents operate as a complete

equipment unit. More specifically, the line card available to Ameritech Illinois is the ADLU card. It is inserted into a shelf within a complete NGDLC RT equipment unit. Although it contains some of the electronic circuitry that enables the NGDLC to perform various functions, the ADLU card cannot perform any of these functions itself. Accordingly, we find that the line card is only a piece-part or sub-component of a complete item of equipment and therefore, is not appropriate for collocation. Significantly, in *Project Pronto Order* (at fn. 11), the FCC agrees with the characterization of an ADLU card as just a piece-part of equipment.

We also find that the requirements of Section 251(c)(6) are not met because line cards, in the context for which the CLECs are seeking new collocation rights, would not be necessary for interconnection. *See* 47 C.F.R. 51.5. The line cards also would not be necessary for access to a UNE. As explained by Ameritech Illinois, the ADLU card is unable to access any of Ameritech Illinois' UNEs at an RT site, or to provide interconnection between Ameritech Illinois' network and a CLEC's network for the mutual exchange of traffic. Rather, CLECs would use such line cards to access the packet switching functionality of Project Pronto NGDLCs, which the FCC has declined to classify as a UNE.

The CLECs' assertion that CLEC collocation of Project Pronto NGDLC line cards is necessary for CLECs to compete is baseless. As a preliminary matter, this is not the applicable legal standard for collocation of equipment set out in Section 251(c)(6) and, as explained above, the CLECs have failed to provide any evidence sufficient to satisfy that standard. More importantly, the CLECs' assertion overlooks the uncontroverted fact that a CLEC can collocate full items of equipment such as its own stand-alone DSLAM at an Ameritech Illinois RT site in order to compete in the advanced services market. Notably, the CLECs' ability to collocate such complete items of equipment at a Project Pronto RT site will be enhanced through Ameritech Illinois' voluntary commitments attached to and adopted by the FCC's *Project Pronto Order*. The CLECs' assertion also overlooks the uncontroverted fact that, even in the absence of CLEC line card collocation and the unbundling of Project Pronto, CLECs are able to compete in the advanced services market through a variety of options, including utilizing Ameritech Illinois' Broadband Service Offering.

In short, the CLECs' proposal that Ameritech Illinois be required to allow CLECs to collocate of Project Pronto NGDLC line cards does not meet the requirements of Section 251(c)(6) for the collocation. Adoption of their proposal also would result in several complications that would likely delay the provisioning process and create increased costs for Ameritech Illinois which this Commission is unwilling to impose, particularly in light of the numerous legal reasons why such collocation should not be allowed. Accordingly, the CLECs' Project Pronto UNE/line card collocation proposal is rejected.

g. *IUB I* AND *IUB III*—NEW FACILITIES/SUPERIOR QUALITY SERVICE.

The CLECs' Project Pronto UNE/line card collocation proposal also violates the Eighth Circuit's holding in *IUB I* and *IUB III* because it requires Ameritech Illinois to either deploy a certain type of equipment associated with Project Pronto which is *different* from what Ameritech Illinois plans to deploy, or *add* additional equipment to the Project Pronto architecture that it is not planning to add. Specifically, the record establishes that the LiteSpan 2000 equipment that

Ameritech Illinois plans to deploy with Project Pronto does not perform wave division multiplexing. Rather, in order to provide such functionality, Ameritech Illinois would have to purchase and install additional equipment. The Eighth Circuit's decisions in *IUB I* and *IUB III* dictate that we reject the CLECs' request.

First, an incumbent LEC is required to provide unbundled access only to its *existing* network, not to construct new facilities simply to provide a UNE that a CLEC desires. *UNE Remand Order*, ¶324; see *IUB I*, 120 F.3d at 813. Requiring Ameritech Illinois to deploy, as part of Project Pronto, equipment that is different from what Ameritech Illinois plans to deploy and that is not part of Ameritech Illinois' existing network clearly violates this principle. *Second*, any requirement that Ameritech Illinois deploy equipment associated with Project Pronto that will perform wave division multiplexing, when the equipment that Ameritech Illinois is currently deploying and plans to deploy does not perform it, is clearly a requirement to provide superior quality service, *i.e.*, a higher level of quality than that which Ameritech Illinois plans to make available in its network. As the Eighth Circuit held in *IUB III*, 219 F.3d at 758, a requirement that an ILEC provide a CLEC with superior quality network elements or interconnection to that which it provides itself "violate(s) the plain language of the Act." In short, any requirement that Ameritech Illinois upgrade its network to make it more compatible with the CLECs' business plans is contrary to federal law.

h. TECHNICAL/POLICY CONSIDERATIONS.

(i) TECHNICAL/POLICY CONSIDERATIONS—LINE CARD COLLOCATION.

In addition to the legal reasons for rejecting the CLECs' line card collocation proposal, we are also compelled to reject that proposal because it is unsound from a policy perspective, as it would reduce, rather than enhance, investment, innovation, and ultimately competition in the Advanced Services market. We should not impose obligations on Ameritech Illinois that would unduly reduce Ameritech Illinois' incentive to continue deployment of Project Pronto in Illinois. Unfortunately, as the record makes clear, the CLECs' NGDLC line card collocation proposal will have precisely that effect, at least with respect to further deployment of Project Pronto facilities on the end-user "side" of the network designed to support the provision of DSL services.

More specifically, the record establishes that CLEC ownership and collocation (whether physical or virtual) of Project Pronto NGDLC line cards will create severe operational problems, introduce inefficiencies into Ameritech Illinois' network, and cause Ameritech Illinois to incur substantial additional costs, none of which would exist if Ameritech Illinois were simply allowed to own and control the line cards, as authorized by the FCC's *Project Pronto Order*. As fully explained below, one of the most serious operational problems that would result is the premature exhaust of the NGDLC system itself, both in terms of physical capacity limitations and bandwidth capacity limitations. In addition, a number of serious provisioning and maintenance problems would result if CLECs were permitted to own or designate and collocate their own ADLU line cards.

The CLECs' line card collocation proposal would threaten to force Ameritech Illinois to reconfigure the Project Pronto architecture in a manner that would be inefficient, more costly, and ultimately provide no additional benefits to CLECs, consumers or Ameritech Illinois. The operational problems associated with the CLECs' proposal would so dramatically change the economics of Ameritech Illinois' planned deployment of DSL-related Project Pronto facilities that Ameritech Illinois might be forced to forego the further deployment of those facilities in Illinois altogether. More broadly, adoption of the CLECs' line card collocation proposal could have a chilling effect on similar investments by Ameritech Illinois and other ILECs, both now and in the future.

- **EXHAUST OF THE NGDLC—PHYSICAL CAPACITY LIMITATIONS.**

Allowing CLECs to own or control and collocate Project Pronto ADLU line cards would result in inefficient use of the Project Pronto facilities on the end-user side of the network, which ultimately could cause premature exhaust of the NGDLC system. As the record establishes, in the Project Pronto NGDLCs used by Ameritech Illinois, the NGDLC RT equipment has a limited number of slots to hold line cards, and the ADLU line card has multiple ports for customer service (*i.e.*, each port serves a separate end user).

Because each line card contains multiple ports, *i.e.*, the ADLU line card serves multiple end-user customers, port-by-port ownership or control by different carriers in a NGDLC channel bank assembly would not be feasible under the HEPO's recommendation. Indeed, under the HEPO's line card collocation recommendation, each CLEC would own and deploy its own set of line cards, and it is highly *un*likely that any CLEC would voluntarily share with other CLECs the ports on a single line card. Rather, each CLEC would reserve the unused ports on each of its line cards solely for its own use. This type of arrangement is plainly inefficient.

More specifically, if each of many CLECs (which easily could exceed 10 or more CLECs per RT) owned or controlled its own multi-port line cards in a particular RT, and therefore had exclusive use of all the ports on those line cards, but only had one customer in the specific geographic area served by that RT, then the other port capacity of that CLEC's line cards would be unused. In other words, unless all CLECs used all of the ports on each of their collocated line cards (an unlikely scenario), inefficient utilization of the NGDLC's slot and port capacity would result. In contrast, if Ameritech Illinois owned all the line cards used in its NGDLC RT equipment, as authorized by the FCC in its *Project Pronto Order*, this inefficient utilization would not occur, as Ameritech Illinois could assign the next available DSL port to whatever CLEC was then ordering DSL service. In short, Ameritech Illinois would be able to assign ports on the same card to multiple CLECs on a port-by-port basis, and thereby more efficiently manage the port capacity of its NGDLCs.

The inefficient underutilization of NGDLC slot and port capacity that would result from CLEC ownership and collocation of line cards is critical, because it would limit the number of feeder pairs available for POTS customers (because more channel bank capacity would be occupied by the unused or partially used line cards of multiple CLECs), as well as limit the number of CLECs that could provide DSL service using Project Pronto NGDLCs. The underutilization of the Project Pronto NGDLC RT also would hasten the exhaust of the slot capacity of the NGDLC equipment itself. This would be detrimental to all CLECs and the ILEC,

because it would create the need for additional capital investments to deploy more NGDLC RTs, and likely cause delays in delivering service to end-user customers associated with the provisioning and installation of those additional NGDLC RTs.

In short, if multiple CLECs are permitted to collocate their own line cards (or line cards that they designate) and those CLECs do not use all four of the copper pairs that are wired to each line card slot (which is highly likely), there would be inefficient use of the NGDLC slot capacity, and as a result, significantly higher equipment costs per DSL line. This type of network inefficiency and increased costs would not occur if Ameritech Illinois owned the line cards, because Ameritech Illinois could assign multiple CLECs to the same line card on a port-by-port basis. In fact, this is exactly how Ameritech Illinois currently plans to provision its wholesale Broadband Service offerings.

- **EXHAUST OF THE NGDLC—BANDWIDTH LIMITATIONS.**

In addition to physical exhaust of the slots in the NGDLC system, CLEC ownership and collocation of line cards would increase the risk of premature exhaust of the system's bandwidth. The most common DSL quality of service (QoS) classes are Constant Bit Rate (CBR), Variable Bit Rate, both real time and near real time (VBR-rt, VBR-nrt), and Unspecified Bit Rate (UBR). The QoS classes offered over Ameritech Illinois' DSL-related Project Pronto facilities will have a significant impact on the availability of bandwidth. Ameritech Illinois is currently offering UBR QoS over the Project Pronto DSL-related facilities, and its business plans for deploying Project Pronto assume extensive use of the UBR QoS. Ameritech Illinois chose to deploy UBR because UBR permits all customers to have an equal chance at the bandwidth resources of the NGDLC, and provides the most efficient use of the shared bandwidth of the NGDLC RT, *i.e.*, it provides access to that shared bandwidth to the greatest number of customers. SBC designed its deployment of DSL-related Project Pronto facilities primarily to serve the mass market with high speed Internet access. Unlike other QoS classes, UBR is ideally suited to serve this purpose. Indeed, UBR allows more customers to be assigned over the NGDLC and the shared fiber facility than could be assigned under any other quality of service class.

In contrast to UBR QoS, CBR and VBR QoS both provide a guaranteed level of service (*i.e.*, a minimum or specific level of "reserved" bandwidth). In other words, in terms of bandwidth allocation within an ATM network, CBR and VBR services are allocated specific levels of bandwidth at the expense of UBR customers. With UBR QoS, the entire bandwidth is available to all customers on a first-come, first-served, "best efforts" basis. However, with CBR or VBR QoS, even though the total amount of bandwidth would remain the same, portions of the bandwidth would be dedicated to certain customers to the exclusion of UBR customers, thereby leaving UBR customers with less bandwidth to share. In light of these differences, it is clear that implementing CBR or VBR QoS on Project Pronto DSL-related facilities would result in a number of adverse consequences on those facilities.

The most serious adverse impact would be on the shared fiber between the RT and the OCD. More specifically, with CBR and VBR QoS, the facility carrying the DSL signal could exhaust the bandwidth capacity of the OC3c before the ports exhaust, which in turn could lead to a negative service impact on those customers using UBR. For example, if each CBR or VBR customer is "given" 1.5 megahertz of bandwidth, only 100 lines would be able to share the OC3c

facility. In that case, only about 15% of the DSL slot capacity of the NGDLC RT facility could be used (100/672), as compared to the total capacity useable on a UBR QoS basis. Such inefficient use of Project Pronto NGDLC facilities would make no sense, would create the need for additional capital investments sooner than would otherwise be necessary, and also could result in delays in providing service to end-user customers associated with the provisioning and installation of additional (and otherwise unnecessary) NGDLC facilities.

In short, UBR QoS is ideally suited for providing high speed Internet access to the mass market, which is the primary purpose for Ameritech Illinois' deployment of DSL-related Project Pronto facilities, and would result in the most efficient use of those facilities. While the introduction of other classes of service is possible, the unlimited and unrestricted introduction of such services could result in premature bandwidth exhaust. Such exhaust would limit the ability of Project Pronto to provide DSL to the mass market or require Ameritech Illinois to upgrade and increase its DSL-related network investment and expenditures much sooner than would otherwise be necessary. Significantly, it is only Ameritech Illinois that would bear the risk that these additional investments and expenditures would be stranded or otherwise unrecovered. If, as a result, Ameritech Illinois were to conclude that these additional costs and expenditures would potentially render its investment uneconomic, it might justifiably conclude, in Justice Breyer's words, that "the game was not worth the candle" (*See IUB II*, 525 U.S. at 430) and forego any further deployment of DSL-related Project Pronto facilities in Illinois.

- **PROVISIONING OF SERVICE.**

We also find that allowing CLECs to own or designate and collocate NGDLC line cards would also adversely impact Ameritech Illinois' provisioning of service to both CLECs and end-users. Specifically, Ameritech Illinois' provisioning intervals for DSL service almost assuredly would be longer if CLECs were permitted to own and collocate NGDLC line cards, as compared to Ameritech Illinois owning the line cards and provisioning Broadband Services in the manner set out in the FCC's *Project Pronto Order*.

The record establishes that, if CLECs were permitted to own and collocate line cards, several complications to the provisioning process would result. Among other things, Ameritech Illinois first would have to maintain a record of which slots in which RTs in which wire centers were dedicated to which CLECs. The CLEC's provisioning systems would also have to inventory, assign, and track the use of individual slots on individual cards in individual RTs in individual wire centers. Passing this CLEC slot/port assignment information between the two companies could complicate and very likely delay the provisioning intervals for new connect orders. Second, when a new card is needed to work a new connect order, the CLEC would have to physically ship a card to Ameritech Illinois so that Ameritech Illinois could place the card into the NGDLC RT. Ameritech Illinois' internal processes allow for this type of activity to occur within normal provisioning intervals when Ameritech Illinois owns the card. If the CLECs own the cards, having to properly identify these types of new connect orders and having to physically obtain the cards from the CLECs would only complicate and very likely delay this process. Despite the CLECs' assertions to the contrary, we believe that these same steps would exist even if the CLEC were allowed only to designate and virtually collocate the line card.

Requiring Ameritech Illinois to perform these additional provisioning steps each time a CLEC submits a DSL-related service order, merely to satisfy the CLECs' desire to own and collocate line cards, simply makes no sense. Clearly, performing these additional provisioning steps would not result in any conceivable benefit to CLECs or consumers. It is equally clear that, these additional provisioning processes would unnecessarily lengthen Ameritech Illinois' provisioning intervals and costs, which is undesirable from any perspective, be it that of Ameritech Illinois, a CLEC, or an end-user. In contrast, if Ameritech Illinois is permitted to own its NGDLC line cards and provision wholesale Broadband Services in the manner that the FCC's *Project Pronto Order* authorizes and contemplates, Ameritech Illinois can pre-equip its NGDLC equipment to support whatever wholesale DSL services that it provides, thereby improving service provisioning flows and intervals.

- **MAINTENANCE AND REPAIR.**

In addition to the economic, operational and provisioning problems described above, we find that allowing CLECs to own or designate and virtually collocate line cards likely would create serious service maintenance and repair problems. More specifically, CLEC ownership or control of line cards would add new challenges and unnecessary complexity to the maintenance and repair process. If the ADLU line card needs to be changed, the CLEC would have to provide a maintenance spare to change out the defective line card. Tracking these maintenance spares would place undue responsibility on Ameritech Illinois. This would become particularly onerous if multiple CLECs with various types of line cards were to collocate them in Ameritech Illinois' NGDLC RTs. Ameritech Illinois' maintenance and repair technicians would be required to identify the owner or designator of the line card, determine whether that owner or designator had provided a maintenance spare, locate that spare, or place a call or order to the owner or designator to provide a spare. This likely would increase the mean time to repair on both the POTS side and the data side of the end-user's service, which would mean longer out-of-service conditions, greater customer dissatisfaction, and a greater number of service-related complaints to this Commission.

We should note that the potential problem that Ameritech Illinois would face on the maintenance and repair front does not involve merely tracking and locating one type of spare line card for a single CLEC. Rather, the problem would involve tracking and resolving these repair and maintenance issues for multiple CLECs with multiple types of line cards that they may have collocated in Ameritech Illinois' NGDLCs RTs. To manage the shipping and handling of the volume of line cards to thousands of possible RT locations for multiple CLECs would be a massive and unreasonable burden to place on Ameritech Illinois. The potential magnitude of these maintenance and repair problems provides yet another compelling reason for us to reject the CLECs' NGDLC line card virtual collocation proposal and instead allow Ameritech Illinois to own the NGDLC line cards and provision wholesale Broadband Services as contemplated by the FCC in the *Project Pronto Order*.

- **THE EFFECT OF LINE CARD COLLOCATION ON FURTHER DEPLOYMENT OF PROJECT PRONTO IN ILLINOIS.**

The CLECs' line card collocation proposal creates a serious disincentive for Ameritech Illinois to further deploy DSL-related Project Pronto facilities in Illinois. Indeed, if Ameritech

Illinois is unable to configure and deploy those facilities efficiently and receive a market-required return on its investment, there would be no sound business reason for it to continue its deployment. Moreover, the message sent by the imposition of costly and inefficient conditions on a voluntary offering in a new market—in which Ameritech Illinois has no monopoly power—will discourage Ameritech Illinois and other ILECs from making this type of substantial investment in the future. Instead of investing in an architecture that will benefit competitors equally, telecommunications companies like SBC will be incented to invest in such new technologies only where the regulatory climate is more hospitable. If ILECs are discouraged from investing in innovative new network architectures, this could result in depriving end users of another choice to access new advanced services technologies and could decrease the availability of an alternative platform for advanced services providers to access the mass market.

Significantly, the FCC has recognized the importance of encouraging incumbent LEC investment in network initiatives that will support Advanced Services, stating, "We are also committed to ensuring that incumbent LECs are able to make their decisions to invest in, and deploy, advanced telecommunications services based on market demand and their own strategic business plans, rather than on regulatory requirements. We intend to take deregulatory steps towards meeting this goal in a subsequent order." *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, ¶ 3. The FCC went on to state, "We intend to address, in a future order, other specific forms of regulatory relief that may be needed to stimulate investment and deployment of advanced services by incumbents or new entrants, or whether other changes to the Commission's local competition rules may facilitate deployment of advanced services by competing carriers." *Id*. at 7. In keeping with the goal of encouraging investment in new technologies, we reject the CLECs' Project Pronto proposal.

- **VIRTUAL COLLOCATION**

It is important to note that the above mentioned operational and technical problems will exist even if CLECs are allowed only to virtually collocate line cards. Among other things, as Ameritech Illinois points out, it has never provided a virtual collocation offering under which Ameritech Illinois, rather than the CLEC, possessed legal title to the equipment being collocated. More importantly, none of the operational and technical problems associated with the CLECs' line card collocation proposal depend on whether Ameritech Illinois technically obtains legal title of those line cards. Rather, it is the CLECs' exclusive use and control of the line cards being placed in Ameritech Illinois' Project Pronto NGDLCs that cause the capacity, provisioning and maintenance problems discussed above. Accordingly, none of the problems identified above would be eliminated by the imposing a requirement that CLECs only virtually collocate line cards.

More specifically, even if Ameritech Illinois technically obtained legal title to the CLECs' virtually collocated line cards, the risks of premature exhaust of the slot capacity of the NGDLC and of bandwidth capacity would remain the same. Indeed, under such circumstances, Ameritech Illinois still could not assign multiple CLECs to the virtually collocated card, as it would be able to do in the absence of the CLECs' collocation proposal. For all practical purposes, the line card still would be reserved for the exclusive use of the CLEC who requested virtual collocation of the card. Similarly, with respect to DSL-related service and UNE

provisioning, Ameritech Illinois would still be required to inventory, assign and track the use of individual slots on individual RTs in individual wire centers. Ameritech Illinois also would have to dispatch a technician to the remote terminal and install a line card for every CLEC each time a CLEC requested virtual collocation. The maintenance problems identified above also would continue under the CLECs' virtual collocation requirement. Indeed, if a virtually collocated ADLU line card needs to be changed, Ameritech Illinois would still have to track spares, identify the designator of the line card, determine whether the designator had provided a spare, locate that spare, or place a call or order to the designator to provide a spare. Again, these problems would only become greater as more and more CLECs virtually collocate more and more line cards.

In short, collocation of the Project Pronto NGDLC line cards (whether physical or virtual) will result in severe operational and technical problems. If, on the other hand, Ameritech Illinois were allowed to own and control the Project Pronto NGDLC line cards in the manner contemplated by the FCC in the *Project Pronto Order*, the DSL-related Project Pronto facilities will be used in the most efficient and economical manner, and none of the operational and technical problems identified above would exist. Accordingly, we reject the CLECs' Project Pronto proposal, and allow Ameritech Illinois to deploy the DSL-related Project Pronto facilities and the associated Broadband Service Offering in the manner contemplated by the FCC and by Ameritech Illinois.

(ii) OTHER POLICY CONSIDERATIONS.

From a policy perspective, it also would not be wise to adopt the CLECs' Project Pronto proposal. Specifically, these issues fall within the scope of pending rulemakings at the FCC. Issues regarding the collocation of line cards in NGDLCs and the unbundling of associated network facilities are pending before the FCC in the *Collocation FNPRM* in CC Docket 98-147 (the *Advanced Services* docket), the comment cycle of which concluded on November 14, 2000. In that case, the FCC has specifically asked parties to address Rhythms' proposal that CLECs be permitted to "collocate" line cards in RTs. See *Collocation FNPRM*, ¶ 109; *Id.*, ¶ 82 (seeking comment on whether line cards are "equipment necessary for interconnection or access to unbundled network elements" as required by Section 251(c)(6)). The FCC has said it will consider all of the "difficult and complex" issues "involved with competitive access to remote terminals" in the context of that proceeding. *Project Pronto Order*, ¶ 49. And, of course, "SBC will be bound by any rules ultimately developed in that proceedings that affect the way in which SBC's incumbent LECs provide access to remote terminals." *Id.*, ¶ 9. We believe it would be unwise for us to prejudge one of these "difficult and complex" issues, as the CLECs seek. Indeed, we would risk unnecessary conflict with the FCC's ultimate rulings.

Similarly, issues regarding CLEC access to RTs and NGDLCs are being addressed by the FCC in the ongoing case initiated by its August 10, 2000 Fifth Further Notice of Proposed Rulemaking in CC Docket 96-98 ("*NGDLC FNPRM*"). In that August 10 Notice, the FCC, citing SBC's October 1999 press release announcing Project Pronto, has sought comment on, among other things, "whether the deployment of new network architectures . . . necessitates any modification to or clarification of the [FCC's] local competition rules, particularly our rules relating to unbundled transport, loops, and subloops." Accordingly, the FCC will likely address in the *NGDLC FNPRM* as well as the *Collocation FNPRM* whether the unbundling of Project Pronto facilities is technically feasible and may be required consistent with the Act. Given the

FCC's continued involvement in these issues, we will refrain from addressing them in this tariff proceeding. Indeed, if this Commission were to prejudge this issue, as the CLECs request here, it would risk unnecessary conflict with the FCC's ultimate ruling.

(iii) OTHER TECHNICAL CONSIDERATIONS

From a technical perspective, it would be unwise to order the unbundling of Project Pronto. The evidence establishes that it is not technically feasible to unbundle this network architecture because of the manner in which the components of the architecture interconnect and interwork with one another. Among other things, it is not technically possible to unbundle lit fiber—which carries numerous end-users' telecommunications traffic—from the end-user customer "side" of the ATM switch at the Central Office, the OCD. This means that the CLECs' proposal would require Ameritech Illinois to unbundle the pre-existing combination of the NGDLC at the RT, the lit fiber running between the NGDLC and the OCD, and the OCD itself – which, as noted above, would directly violate the FCC's determination that packet switching functionality is not subject to unbundling (except in limited circumstances not applicable here).

As explained by Mr. Lube, a single end-user's DSL service will not occupy a consistent end-to-end path through this architecture, or have a consistent interface at each end of the path. Consequently, the physical parts of this architecture used to provide DSL service to an end-user will not bear a one-to-one correspondence to one another throughout the DSL service's path. When a CLEC provides DSL service to a single end-user using the Broadband Service, the single end-user's DSL service will be partially a physical path and partially a virtual path through these various network components. Therefore, the end-user's DSL service can be physically accessed in some parts of the end-to-end path, but cannot be physically accessed in other parts. In particular, the end-user's DSL service cannot be accessed as a specific, unique unbundled network element at the central office connection to the CLEC (*i.e.*, the OCD port). Because of this, Ameritech Illinois is making available to CLECs end-to-end wholesale Broadband Services, running from the end-user's premises to Ameritech Illinois' central offices, for incorporation into CLECs' own DSL services for their individual end-users. These Broadband Services provide CLECs with the full advanced services functionality of the equipment that Ameritech Illinois actually deploys under Project Pronto. *Id.*

i. BENEFITS OF PROJECT PRONTO.

The Commission's decision not to unbundle Project Pronto is due in part to the important fact that Ameritech Illinois' planned deployment of the DSL-related Project Pronto facilities and the Broadband Service Offering is beneficial to CLECs, consumers, Ameritech Illinois and the public at large. With respect to CLECs, as the FCC has recognized, Ameritech Illinois' planned deployment of those facilities and the associated Broadband Services Offering clearly creates new business opportunities for CLECs. *Project Pronto Order*, ¶¶ 23, 28. The Broadband Services Offering is available on identical terms to all CLECs, including Ameritech Illinois' data affiliate, and allows data CLECs to reach millions of customers that could not be reached efficiently or economically before. *Id*. The Broadband Services Offering also reduces the amount of up-front capital required for a CLEC to begin providing DSL service to a new community by minimizing the amount of collocation required and eliminating the need to purchase DSLAMs. In addition, and perhaps most importantly, Ameritech Illinois' planned

deployment of the DSL-related Project Pronto facilities and the associated Broadband Services offering will give CLECs a *new, additional* option for providing DSL service. Moreover, data CLECs will retain all of the existing options available today for providing such data services, including obtaining xDSL-capable stand-alone copper loops, FCC-defined line sharing, and sub-loop unbundling. *Id*. In short, *the CLECs lose nothing but gain access to a previously unavailable market*. This new market opportunity is particularly important to DSL service providers. In today's current market, the availability of cable modems far surpasses the availability of DSL technologies. The type of network investment represented by Ameritech Illinois' planned deployment of the DSL-related Project Pronto facilities will encourage the continued growth and development of DSL-based technologies.

We disagree with the CLECs assertions that, in the absence of their Project Pronto proposal, the following will occur: (1) CLECs somehow will be competitively harmed; (2) the rapid deployment of advanced services will be hindered; (3) consumer choices will be limited; and (4) CLECs will be unable to differentiate their product offerings. The FCC has found that the exact opposite is true in each case, and so do we. In the *Project Pronto Order* (at ¶ 2), the FCC stated "we expect consumers will benefit not only from a more rapid deployment of advanced services, but from the increased choices that stem from the competitive safeguards contained in SBC's proposal." The FCC went on to conclude that "SBC's proposal serves the public interest" and "should provide consumers a greater choice of both services and providers in the near term." *Id*. at 23. The FCC went on to say, "In particular, we find that SBC's proposal should affirmatively and identifiably promote the rapid deployment of advanced services in a pro-competitive manner, thereby serving the goals of section 706." *Id*. Finally, the FCC stated, "Our approval of SBC's request subject to its pro-competitive commitments . . . paves the way for Rhythms and other carriers to compete for those customers [who would not be able to receive DSL service without Project Pronto]. SBC's commitments will facilitate Rhythms' access to remote terminals and enable Rhythms and others to differentiate their product offerings from those of SBC's Advanced Services Affiliate." *Id*. at 28.

Although the various commitments made by Ameritech Illinois in exchange for being permitted by the FCC to own and control the NGDLC line cards create additional benefits to CLECs that would not exist absent Project Pronto, the CLECs attempt to distort those benefits. To provide one example, under the FCC-adopted commitments and the *Project Pronto Order*, Ameritech Illinois has agreed not to retire, through September 2001, any central office-terminated copper loops overlaid by the Project Pronto architecture, except as required by acts of God. Additionally, Ameritech Illinois is prohibited through September 2003 from using its retirement policy to retire more than 5% of its total CO-terminated copper loops in service as of September 1, 2000. The CLECs nevertheless complain that Ameritech Illinois has no restrictions from retiring its copper plant after 2003. The fact of the matter is that Ameritech Illinois has previously *never* had *any* of these types of restrictions on retirement of its plant. This new commitment, as well as the other commitments made by SBC's ILECs, provides CLECs with benefits that they would not otherwise enjoy absent Project Pronto.

Ameritech Illinois' planned deployment of DSL-related Project Pronto facilities also will have a substantial beneficial impact on the public in Illinois and elsewhere. Large network investments, such as Ameritech Illinois' planned investment in these facilities, equate to

additional jobs. These jobs include the Ameritech Illinois employees who implement the deployment of those facilities as well as the employees of the various vendors, suppliers and contractors supporting that deployment. The deployment of these facilities also will provide consumers (as well as advanced services providers) with additional DSL service choices that are not available today. It also will enable more schools to access the broadband services that are becoming increasingly important in today's technological society. It will promote telecommuting, which opens up many previously unavailable opportunities to the disabled and homebound, as well as providing benefits to the environment through decreased need for commuting. This is precisely the kind of investment the 1996 Act envisioned and sought to encourage.

Ameritech Illinois also expects to benefit from its planned deployment of the DSL-related Project Pronto facilities. This is an unsurprising and basic economic and business fact, given that Ameritech Illinois is the party making the investment in those facilities. Despite the CLECs' suggestions to the contrary, we do not find anything improper in Ameritech Illinois benefiting from its investments, nor has Ameritech Illinois done anything to impede the CLECs' ability to compete. As with any other business, Ameritech Illinois is subject to the basic rules of economics. And as noted above, the Advanced Services market is a competitive market in which Ameritech Illinois does not have any type of monopoly power. Clearly, Ameritech Illinois must have the opportunity to benefit from the investments that it makes in that market, otherwise it would have no economic basis for making those investments. Moreover, as pointed out by Ameritech Illinois, it has no reason to raise impediments to its CLEC customers' provision of DSL services. Indeed, the benefits Ameritech Illinois stands to derive from its planned deployment of the DSL-related Project Pronto facilities are a direct result of its success in providing wholesale Broadband Services to its CLEC customers. Ameritech Illinois does not provide any retail DSL services. Rather, the Broadband Service Offering is a wholesale offering to CLEC customers. Accordingly, it is in Ameritech Illinois' best interest to make the Broadband Service offering as appealing as possible to CLECs.

j. DIFFERENTIATION

The CLECs' asserted concerns about obtaining different "flavors" of DSL and not being able to "differentiate" their DSL product offerings are baseless. The Project Pronto NGDLCs manufactured by Alcatel can currently support ADSL and a TDM version of HDSL. In the future, Alcatel is expected to offer HDSL-2 (TDM), g.SHDSL and G.Lite DMT. In fact, Ameritech Illinois has committed to making G.lite available on an RT-by-RT basis starting within six months after development and commercial availability from Alcatel. Ameritech Illinois also has committed to conduct collaborative discussions with the CLECs and equipment manufacturers to address future types of DSL service that may be supported over the Project Pronto network. Clearly, different "flavors" of DSL will be available with Ameritech Illinois' Broadband Service Offering and CLECs will have input on future developments.

Moreover, the CLECs' claim that the Broadband Service offering will not allow for sufficient product differentiation by CLECs is not supported by the record and, in fact, has been rejected by the FCC. *See Project Pronto Order*, ¶¶ 23, 28. The record establishes that, under the Broadband Service Offering, CLECs have the ability to differentiate their retail DSL products from other CLEC's retail DSL products. Indeed, every CLEC will have access to all features

and functions, both present and future, actually deployed with Project Pronto NGDLCs available through the Broadband Service at the same time and under the same terms and conditions. Ameritech Illinois also intends to make new features and functions available in the Project Pronto architecture, so that additional services can be offered by the CLECs in the future. Moreover, under Ameritech Illinois' Broadband Service Offerings, even the current ADSL capabilities of the Project Pronto architecture can be offered by CLECs with different combinations of upstream and downstream speeds. As the FCC recognized in the Project Pronto Order, the Broadband Service Offering allows for a variety of different combinations of upstream and downstream data speeds. Therefore, DSL product differentiation is already available to all data CLECs on a nondiscrminatory basis through the Broadband Service.

As noted above, the FCC already has rejected the CLECs' assertions about their alleged inability to differentiate their product offerings in the *Project Pronto Order*. Specifically, the FCC found:

> Our approval of SBC's request subject to its pro-competitive commitments . . . paves the way for Rhythms and other carriers to compete for those customers [who would not be able to receive DSL service without Project Pronto]. SBC's commitments will facilitate Rhythms' access to remote terminals and enable Rhythms and others to *differentiate their product offerings from those of SBC's Advanced Services Affiliate*.

Id., ¶ 28 (emphasis added). The FCC emphasized that the SBC ILECs' commitments will "help ensure that consumers will have a wide array of choice[s]" because SBC will "mak[e] available all features, functions, and capabilities of the equipment installed in remote terminals at just, reasonable, and nondiscriminatory rates, terms, and conditions." *Id.*, ¶ 42. "By unleashing the full potential of the [Project Pronto] equipment," the FCC found, "SBC's commitment will help competitive LECs provide innovative, exciting new services" and enable CLECs to "compete more effectively against SBC by differentiating their product offerings." *Id.*, ¶ 45. Obviously, the FCC was convinced that the Broadband Service Offering allows Rhythms and Covad to differentiate their product offerings and this Commission should find likewise.

Similarly, the CLECs' suggestion that Ameritech Illinois is somehow attempting to mandate the technology, the configuration, and the types of service offerings available on the Project Pronto topology ignores the facts. Ameritech Illinois is required by the *Project Pronto Order* to conduct, is already conducting, and will continue to conduct, collaborative discussions with the CLECs to address further types of DSL that may be supported over the Project Pronto DSL-related facilities. Significantly, Ameritech Illinois, not CLECs, is the party deploying the DSL-related Project Pronto facilities and bearing all of the associated investment risk. As a result, CLECs should not be able to dictate the deployment of a technology, a topology, a manufacturer, or even a feature or software release in Ameritech Illinois' network. As explained above, Ameritech Illinois made its initial decision to deploy the DSL-related Project Pronto facilities based on sound economic and technical considerations. It cannot be forced to now deploy a different architecture that is neither economical nor technically efficient. Indeed, under the Eighth Circuit's decisions in *IUB I* and *IUB III*, Ameritech Illinois cannot be lawfully required to unbundle a superior or different network than that which Ameritech Illinois has deployed. If a CLEC wants a different or particular type of DSL network technology or

topology designed to serve its own individualized business needs or objectives, it certainly could undertake its own deployment of that other network. That is the essence of competition.

k. TECHNICAL FEASIBILITY OF FIBER SHARING OVER NGDLC SYSTEMS.

Although the CLECs admit that these NGDLC facilities, as deployed by Ameritech Illinois, will not carry voice and data traffic over the same fiber, they suggest that Ameritech Illinois should have deployed a "fiber sharing" Project Pronto NGDLC configuration, and that Ameritech Illinois' "business decision" to have separate voice and data fibers is somehow improper. We find the manner in which Ameritech Illinois choose to deploy Project Pronto wholly irrelevant.

The record on rehearing establishes that the vast preponderance of the fiber-fed NGDLC equipment being deployed by Ameritech Illinois under Project Pronto is Alcatel Litespan 2000, which utilizes separate fiber paths for data and voice. This literally means only voice services such as POTS travel on the fibers dedicated to voice transport, and only data services such as DSL travel on the fibers dedicated to data transport. Therefore, no fiber sharing will take place within these Project Pronto NGDLC systems. There simply is no relevance to Ameritech Illinois' business decision to deploy DSL-related facilities that utilize separate fibers rather than the same fibers for voice and data services. Moreover, there is no legitimate reason why Ameritech Illinois should incur the additional costs associated with deploying DSL-related facilities that carry voice and data over the same fiber. Ameritech Illinois has sound business and technical reasons for building its network in the manner it has chosen, and its decision should not, and will not, be second-guessed or nullified by CLECs or this Commission.

The bottom line is that Ameritech Illinois is under no obligation to purchase any particular or additional equipment to deploy in its network, particularly where that additional equipment is unnecessary and more costly, and where there is no economic reason for utilizing such equipment. The type of NGDLC being deployed by Ameritech Illinois under Project Pronto generally does not multiplex data and voice signals onto the same fibers. It is irrelevant whether Ameritech Illinois' NGDLC manufacturers make any other equipment that does enable such fiber sharing, or whether another manufacturer's equipment permits or utilizes such fiber sharing. Ameritech Illinois chooses its suppliers of electronic equipment based upon many factors, such as availability, system capacity, delivery interval, price, and warranty. Ameritech Illinois' business decisions with respect to Project Pronto are based upon economic engineering principles and are designed to achieve the most cost-efficient deployment of the facilities it plans to deploy. Such business decisions are clearly within Ameritech Illinois' discretion.

For all of the reasons explained above and by Ameritech Illinois, the CLECs Project Pronto UNE/line card collocation proposal is unlawful and unwise from a policy perspective. Accordingly, we reject that proposal.

III. OSS ACCESS

The HEPO's recommended Commission Analysis and Conclusion Section on pages 35-37 should be replaced with the following:

Commission Analysis and Conclusion:

Ameritech Illinois' proposed tariff language fully complies with its obligation to provide OSS functions necessary to provision line sharing. This proposed language reflects Ameritech Illinois' active participation in the various ongoing FCC and Illinois proceedings to address and resolve and resolve these issues with the CLECs. Throughout the collaborative process, Ameritech Illinois has agreed to provide 45 data-information elements to achieve OSS functionality for the provisioning of line sharing. CLECs have not disputed this fact.

To provide CLECs with nondiscriminatory access to its OSS functions, Ameritech Illinois has designed and deployed "gateways" or "electronic data interfaces" that provide CLECs a single entry point for pre-ordering, ordering, provisioning, maintenance and repair, and billing. As Ameritech Illinois' witness on OSS-related matters, Robin Jacobson, explained using a single, gateway, CLECs can access the various OSS functions that are needed to provide adequate and efficient local service to their particular end users. The data elements are currently available in the Graphical User Interface (GUI) of Ameritech Illinois' TCNET website and through an electronic data interface. By March 2001, the same data elements will be accessible through a new GUI (Verigate) requested by the CLECs.

CLECs have not identified any OSS information that they contend they need or are entitled to that Ameritech Illinois has refused to provide through its interfaces in connection with HFPL provisioning.

Moreover, we do not believe that direct access to Ameritech Illinois' back end systems is compelled by FCC decisions. The FCC obviously had the opportunity to order ILECs to permit CLECs direct access to their back office systems, but it chose not to do so. Instead, the FCC merely ordered that ILEC's make available the information necessary to support OSS functions X information that Ameritech Illinois has made available through its gateways. Indeed, in the UNE Remand Order (at ¶¶ 426, 428, 429, 430-431), the FCC stated:

> …the pre-ordering function includes access to loop qualifications **information.**..Loop qualification **information** identifies the physical attributes of the loop plant…
>
> ***
>
> [T]he incumbent **LEC** must provide access to the underlying **loop qualification information** contained in its engineering records, plant records, and other back office systems…
>
> ***
>
> [T]o the extent that ILEC employees have access to the information in an electronic format, **that** same format should be made available to new entrants **via an electronic interface**.
>
> ***

> the relevant inquiry is… whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's **personnel**.

CLECs have not adequately explained why Ameritech Illinois' agreement to provide the 40+ line-sharing data elements requested by the CLECs in the various POR collaboratives satisfies the requirements of the UNE Remand Order.

That being said, there is an additional substantial reason why we are reluctant to order direct access to Ameritech Illinois back office systems for loop qualification information for all CLECs at this time. Direct access to Ameritech Illinois' back office systems raises a number of issues concerning access to confidential information of carriers and customers who have not given consent for such access. Direct access to Ameritech Illinois's back office systems, even on a read-only basis, would provide CLECs with the ability to read all the data in those systems. It is unconceivable that a CLEC could have authorization from all the customers whose information it could view via direct access, much less the information of other carriers.

We addressed this very issue in the order recently issued in Docket 00-0592, the OSS arbitration proceeding (*OSS Order*) and similarly denied CLECs' request for direct access to Ameeritech Illinois' back end systems. Specifically, we found:

> Access to marketing information for either Ameritech Illinois or other CLECs, however, should not be available to any potential competitor.
>
> Unlimited, unrestricted and undefined access to AI' s back-end systems, as the record suggests, cannot be countenanced. The Commission is greatly concerned that none of the issues related to direct access, such as confidentiality, functionality, or security, have been resolved or even addressed in this cause. It is unclear how competitor information would be "firewalled" so that confidentiality concerns would be addressed. It is unclear how the functionality of systems at either Ameritech Illinois or the CLECs end would be impacted. We see no standards of conduct developed or agreed upon by the parties. Thus, it is unclear how data security concerns or disputes would be resolved. These are grave matters.
>
> We need to know exactly what the CLECs want, why they cannot get it through other means and how they propose to proceed. We cannot allow any CLEC to rifle through back systems without any parameters and without some protective measures in place. In our view, the purpose of electronic gateways such as EDI or GUIs is to provide information contained in Ameritech Illinois OSS systems electronically and eliminate the need for a direct access requirement.

The questions that we had in that proceeding remain unanswered in this one. Therefore, we must similarly conclude that there is no justification for requiring Ameritech Illinois to provide CLECs with direct access to their back end systems in this context.

IV. PROVISIONING SPLITTERS ON A SHELF-AT-A-TIME BASIS VS. LINE-AT-A-TIME BASIS.

The HEPO's recommended Commission Analysis and Conclusion Section on page 38 should be replaced with the following:

Commission Analysis and Conclusion:

Rhythms is *not* correct that Ameritech Illinois' failure to provide splitters a shelf-at-a-time is contrary to the FCC's rules. Since, as we found in the *Rhythms/Covad Arbitration Decision*, that Ameritech Illinois is not required to provide splitters at all, its refusal to provide shelf-at-a-time splitters cannot be a violation of the FCC rules. Rhythms' interpretation of the rules would obligate ILECs to provide all terminating equipment necessary to make access to UNEs feasible. That clearly is not the case and, as Ameritech pointed out, that is what collocation is for - so that CLECs have the opportunity to locate their own transmission/terminating equipment in ILEC offices to access UNEs.

Nonetheless, we must decide whether our shelf-at-a-time requirement in the *Rhythms/Covad Arbitration Decision* should be imported into this case. We disagree with the CLEC coalition that such a requirement is mandated by law. Clearly the contexts are different. In the *Covad* case, we were addressing an arbitration decision between individual specific CLECs and Ameritech Illinois, in the context of their negotiation of interconnection agreements, the terms of which are generally negotiated between the parties. This case, on the other hand, involves a tariff with "off-the-shelf" provisions applicable to any CLEC without the need to negotiate any provisions.

After reviewing the evidence, we do agree that, as the number of CLECs proliferate, the amount of unused shelf space and splitter capacity that cannot be used for other carriers will naturally increase. In addition, so will the presence of additional connecting blocks on intermediate distribution frames. In the tariff context, of course, the parties are not able to negotiate specific provisions designed to protect their interests. In this light, we decline to require Ameritech Illinois to include provisions in its tariff to offer splitter functionality on a shelf-at-a-time basis.

V. LINE SHARING PROVISIONING INTERVALS

The HEPO's recommended Commission Analysis and Conclusion Section on page 42 should be replaced with the following:

Commission Analysis and Conclusion:

First of all, Rhythms' request for provisioning intervals that are even shorter (for conditioned loops) than those it asked for and obtained in the *Covad/Rhythms Arbitration* case is denied. Rhythms provides no justification for compressing the intervals even more. Second, we find that circumstances have changed sufficiently for us to evaluate provisioning intervals anew in the context of this proceeding. Specifically, Ameritech's offer of a three business day interval

for unconditioned loops, which interval includes a testing procedure, the principles of which have been agreed to between Ameritech and CLECs, is a significant improvement over the intervals originally proposed. Moreover, we note that even our decision in the Covad/Rhythms case would have permitted the provisioning to be tolled during the pendency of any testing.

These factors must be evaluated especially in the context of a tariff offering that would be available off the shelf to any CLEC. The fact that the provisioning intervals we specified in the Covad/Rhythms proceeding were shorter than those available for other Ameritech Illinois services must also be considered. We agree with Ameritech that adopting a significantly shorter interval uniquely for the HFPL UNE would have the effect of requiring Ameritech installation personnel to move these orders "to the front of the line". We agree that the revised standard intervals as proposed by Ameritech, with parity with AADS as a backstop, are sufficient to protect CLECs' interest. For application on a broad scale basis as applied to an undetermined number of CLECs who may take the HFPL UNE pursuant to Ameritech Illinois' tariff, we find that the revised proposed intervals are entirely reasonable given the amount of work required to provision and install the HFPL UNE. Accordingly, we find that Ameritech's proposed provisioning intervals, as revised, are reasonable.

VI. LIABILITY PROVISIONS

The HEPO's recommended Commission Analysis and Conclusion Section on pages 46-47 should be replaced with the following:

Commission Analysis and Conclusion:

The Commission finds Ameritech Illinois' liability, indemnification and customer notification provisions reasonable. Requiring the data CLECs to notify and obtain the permission of the end-user before performing intrusive testing is reasonable in light of the fact that telephone *voice* service is the primary tool used by end-users to summon emergency assistance. Absent notification by the CLEC, the customer would have no advance knowledge of any telephone service outage that may result from the CLEC's intrusive testing. Additionally, requiring the CLECs to indemnify Ameritech Illinois is reasonable, as the CLECs are using Ameritech Illinois' facilities to provide telecommunications services, not vice versa. Ameritech Illinois' proposed liability and indemnification provisions also are consistent with the FCC's spectrum management policies set out in the FCC's *Line Sharing Order* (¶¶ 178-211 generally), which are designed to protect against significant interference with or degradation to existing voice services provided over the public switched telephone network.

We disagree with the CLEC's suggestion that the liability and indemnification provisions in Ameritech Illinois' HFPL UNE tariff should be reciprocal. There is absolutely no basis for adopting such a requirement. The primary purpose of Ameritech Illinois' indemnification provision is to protect Ameritech Illinois in the event that a customer, because of a service outage caused by a data CLEC, cannot use its telephone voice service for emergency assistance and is seriously harmed. As Staff recognizes, most end users use their voice service, not their data service, for emergency situations. Tr. 1175. Accordingly, reciprocal liability and indemnification provisions are improper and unnecessary.

In sum, Ameritech Illinois' proposed notification, liability and indemnification provisions are reasonable and necessary for Ameritech Illinois' protection (as well as the protection of end-users). Accordingly, we approve these provisions.

VII. LOOP CONDITIONING AND QUALIFICATION

A. CONDITIONING CHARGES

The HEPO's recommended Commission Analysis and Conclusion Section on page 49 should be replaced with the following:

Commission Analysis and Conclusion:

We adopt Ameritech Illinois' proposed loop conditioning charges because they are based on the forward looking costs Ameritech Illinois expects to incur for such conditioning. The CLECs' proposal to pay nothing for loop conditioning must be rejected because it is contrary to federal law.

The FCC determined in its *Local Competition Order* that ILECs are entitled to recover loop conditioning costs that are incurred when the ILEC conditions a loop at a CLEC's request. In its *Local Competition Order* (at ¶ 382), the FCC stated:

> Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities. . . . [S]ome modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3). The requesting carrier would, however, bear the cost of compensating the incumbent LEC for such conditioning. (Original footnotes omitted.)

The FCC reaffirmed this conclusion in the *UNE Remand Order* (at ¶¶ 192-193) and made clear that CLECs must compensate ILECs for loop conditioning regardless of whether the ILEC's network is designed as it would be if it were rebuilt from scratch today.

Indeed, although the FCC pointed out that "networks built today normally should not require voice-transmission enhancing devices on loops of 18,000 feet or shorter," the FCC recognized that "devices are sometimes present on such loops, and the incumbent LEC may incur costs in removing them," and thus held that "the incumbent should be able to charge for conditioning such loops." *UNE Remand Order*, ¶ 193. In the *Line Sharing Order*, the FCC reaffirmed its earlier determinations that an ILEC is entitled to recover loop conditioning charges, and may do so regardless of whether its network, if rebuilt from scratch today, would have such devices:

> In the *Local Competition Third Report and Order* we clarified that incumbent LECs are required to condition loops to enable requesting carriers to offer advanced services, wherever a competitor requests, even if the incumbent LEC itself is not offering xDSL services to the customer on that loop. . . . Moreover,

> we concluded that although loops of 18,000 feet or shorter normally should not require voice-transmission enhancing devices, these devices are sometimes present on such loops and *the incumbent LEC should be able to charge for conditioning such loops*. (emphasis added and original footnotes omitted.)

The *Line Sharing Order*, ¶ 82. CLECs' proposal in this case that they pay nothing for loop conditioning is contrary to these unequivocal statements and, therefore, rejected.

Rhythms' principal objection to Ameritech Illinois' loop conditioning charges—and the primary basis for their zero charge proposal—is their theory that prices should be set based on a hypothetical most efficient network configuration. Rhythms asserts that, in a forward looking network, loops would be designed free of impediments to xDSL technology, such as load coils and excessive bridged tap and, therefore, CLECs should not pay for the removal of such impediments. As a preliminary matter, Rhythms is incorrect when it asserts that bridged taps and load coils are "obsolete" equipment. As the record establishes, not all xDSL inhibitors are unnecessary, rather, load coils and repeaters are still used today to provide voice grade service. Similarly, bridged tap is *not* a design flaw for POTS service and was purposefully engineered into the loop plant to allow for flexibility and decreased outside plant costs.

More importantly, Rhythms' theory ignores that fact that under the FCC's *UNE Remand Order* and *Line Sharing Order*, the FCC recognized that ILECs incur real costs when they perform loop conditioning, and held that ILECs are entitled to recover those costs. The CLECs theory also ignores the fact that, even if the most efficient network configuration were assumed to exist, that configuration would *not* be designed to promote the provision of but a single service by a single group of providers, such as DSL service. Indeed, Rhythms' argument that it should not pay for replacing "obsolete network infrastructure" is based on the incorrect assertion that loop conditioning prices should be determined based on the most efficient network configuration assuming that the network were rebuilt from scratch today. At the outset, there is no evidentiary basis for us to assume that a "most efficient network configuration" would be one optimized for the provision of a single service, namely, DSL service. Moreover, the CLECs position violates the Eighth Circuit's decision in *IUB III*. Indeed, under the Eighth Circuit's decision, loop conditioning charges must be based on what the network *actually* contains, not what Ameritech Illinois' network *ought* to contain. All the parties agree that these devices actually exist in Ameritech Illinois' network. Accordingly, under *IUB III*, Ameritech Illinois is entitled to recover those costs. Even if the Commission were not bound by the Eighth Circuit's decision in *IUB III*, the Commission cannot lawfully adopt Rhythms' position because it is contrary to the FCC's *UNE Remand Order* and *Line Sharing Order*, as noted above.

In short, the FCC has specifically held that ILECs must provide conditioned loops whenever a competitor requests such a loop, and that the requesting carrier must compensate the incumbent for the cost of conditioning the loop. Given these controlling FCC pronouncements, Ameritech Illinois must be allowed to charge for the loop conditioning that it actually performs, regardless of whether such xDSL impediments would exist in a forward looking network and regardless of the length of the loop.

In support of their proposed zero price for loop conditioning, the CLECs' assert that condition costs should be part of ongoing maintenance and investment in modern

telecommunications plant. We disagree. Ameritech Illinois' modernization plans do not include the systematic removal of bridged tap, repeaters and load coils when used in copper cables. As the record establishes, Ameritech Illinois has never instituted a routine practice of performing loop conditioning activities as part of maintaining the loop plant, rather, these devices are useful to Ameritech Illinois' provision of telecommunications services and are not design flaws or outdated equipment. More importantly, the FCC clearly does not consider loop conditioning to be part of an ILEC's modernization costs because it specifically held that CLECs, not ILECs, must pay for such conditioning.

We also reject the CLEC Coalitions' assertion that Ameritech Illinois waives conditioning charges for its retail customers and, therefore, must be recovering those costs elsewhere. As all the parties to this proceeding recognize, Ameritech Illinois does not provide advanced services to retail customers. Because Ameritech does *not* provide advanced services, it does not and would not have any reason to provide retail customers with conditioned loops. More importantly, retail service is not analogous to UNEs and the FCC has specifically held that ILECs, such as Ameritech Illinois, are entitled to recover loop conditioning costs from requesting carriers.

We also reject the CLECs' argument that Ameritech Illinois' conditioning charges should be rejected because the network assumptions underlying Ameritech Illinois' proposed conditioning charges are inconsistent with the assumptions used for its recurring rates. This argument ignores the applicable law. The FCC specifically held that ILECs are entitled to recover their loop conditioning costs through separate charges precisely because those costs are not captured in the ILEC's standard loop prices. Moreover, the activities specifically identified in the conditioning cost study, *e.g.*, detachment of load coils, bridged taps, and repeaters, have not been recorded in Ameritech Illinois' books of accounts and, therefore, are not embedded. On the contrary, these costs reflect the activities that will happen on a going forward basis, if requested by the CLEC.

As for the price to be paid for conditioning, we find that Ameritech Illinois' cost studies provide accurate prices for loop conditioning. Ameritech Illinois identified the workgroups involved in performing loop conditioning activities, the tasks associated with line conditioning, the times required to perform those tasks, and the salary levels of the personnel performing the various work activities. Ameritech Illinois has verified the accuracy of its loop conditioning time estimates. Ameritech Illinois personnel reviewed the work being done and determined that the actual time required to condition facilities is consistent with the time estimates in the cost study. Additionally, Ameritech Illinois' cost study provides reasonable assumptions concerning the number of disturbers that will be present on loops.

We are not concerned that Ameritech Illinois developed an *average* cost of performing conditioning for loops less than 18,000 feet. Such an approach has several benefits. Specifically, if actual costs on a job-by-job basis were utilized, neither Ameritech Illinois nor the CLEC would even know the total costs until the work was completed. It is far better to assume average costs of typical plant combinations than to cost out each and every work activity and bill CLECs special construction, versus a flat rate charge that can be easily ordered and billed via the LSR format. It is notable that Ameritech Illinois established standard conditioning prices based

on average costs in response to CLECs' demands for standard pricing, yet the CLECs now complain about the fixed price. We are also not concerned with the fact that Ameritech Illinois is charging on an incremental basis (*i.e.* per load coil, per bridged tap, and per repeater) for loops greater than 18,000 feet, but not for loops less than 18,000 feet. Although average prices are preferable for the reasons described above, it simply is not possible to do so for loops greater than 18,000 feet. Specifically, unlike loops less than 18,000 feet, it is not possible to use an average cost of performing conditioning for loops greater than 18,000 feet because, unlike shorter loops, there is a large variance in the number of load coils or bridged taps on such loops. In short, the costs of removing load coils, bridged taps, and repeaters on loops longer than 17,500 feet were developed on an incremental basis because of the variability in the costs for conditioning these longer loops.

Rhythms attacks the time estimates in Ameritech Illinois' cost studies and proffers its own assumptions regarding work times. We believe Rhythms' figures understate the time required to perform tasks. Among other things, Rhythms data assumes that weather is *never* a factor in a technician's day-to-day job responsibilities, and fail to provide time for engineering and drafting the jobs. Additionally, Rhythms' analysis fails to consider work area protection. As Ameritech Illinois explained, the amount of work area protection is dependent upon the speed limit of the road or highway, whether a lane of traffic is blocked, whether the set up is in an intersection, and other factors. None of these factors were considered in developing Rhythms' task times. Specifically, the photographs do not depict performing these activities on a working splice case out in the field, rather, the work depicted was performed in front of a garage. Performing the tasks in front of a garage does not accurately reflect, and would be much shorter than, the time that would be required out in the field.

Although Staff suggests that the Commission-approved shared cost factor for Ameritech Illinois should not be applied to loop conditioning costs, we disagree. Staff's proposal is contrary to the law, and is based on a misreading of the FCC's *First Report and Order*. The FCC has held that incumbent LECs should be allowed to recover their loop conditioning costs, and that those costs should be determined using principles embodied in the TELRIC methodology (which includes application of shared and common costs). Accordingly, Staff's position not to apply the shared cost factor to loop conditioning is contrary to the FCC's TELRIC methodology. *See First Report and Order*, ¶¶ 676-682. Staff has presented no valid basis to deviate from the FCC-mandated TELRIC methodology for loop conditioning.

We also reject Staff's argument that bridge tap removal rates should be recalculated without any cost for reinstallation. Ameritech Illinois has provided extensive testimony that it is proper to include the reattachment of bridged tap in its loop conditioning cost study. Bridged tap is not a design flaw and was purposefully engineered into the network to provide network flexibility and to reduce costs. Ameritech Illinois' cost study appropriately reflects the fact that, in some percentage of cases, bridged tap will need to be reinstalled. Indeed, by requesting the removal of bridged tap (a beneficial part of Ameritech Illinois network for the purpose of providing service to end-users), the data CLEC makes the bridged tap unusable for POTS service. In order to make the bridged tap useable for POTS, it must be reattached to another loop. Because the data CLEC is clearly the cost causer of such reattachment, it should pay for the associated costs.

We also reject the proposal that Ameritech Illinois' loop conditioning charges be adjusted to account for conditioning multiple loops within a binder group at one time. As Ameritech Illinois explained, if Ameritech Illinois were to condition all copper loop pairs in a binder group at the same time, substantial and unnecessary work would be required of network engineers. Specifically, Ameritech Illinois' network would have to be reengineered because some loops still require load coils and repeaters. Indeed, not all xDSL inhibitors are unnecessary, rather, load coils and repeaters are still used today to provide voice grade service. If Ameritech Illinois were to institute a practice of "deconditioning" all pairs in a binder group at the same time, there would be instances where customers' POTS service would be degraded or not work at all if the two load coils were removed.

Similarly, Ameritech Illinois cannot remove all bridged tap across all pairs in a binder group when removing bridged tap off of one pair. While Ameritech Illinois will remove bridged tap over 2,500 feet in length for a DSL loop, Ameritech Illinois cannot remove all bridged tap on all pairs in the binder group when those other pairs are designed or used to provide telephone services to other customers. The bridged tap is actually a cable sheath that serves other addresses beyond the DSL end user's premise served by a single loop cable pair in the binder group. This bridged tap is *not* a design flaw for POTS service and was purposefully engineered into the loop plant to allow for flexibility and decreased outside plant costs. If Ameritech Illinois were required to remove bridged taps a binder group at a time, it would incur additional, unnecessary and inefficient costs to provide new outside plant facilities to all of the locations that Ameritech Illinois was serving via bridged taps. Moreover, to avoid disconnection of service to those customers being served with bridged taps, those additional facilities would have to be constructed and installed before the bridged taps were removed. This would be wasteful and impracticable.

In short, removal of these devices would create more work, potential service disruptions, unhappy customers and increased capital and operating costs which Ameritech Illinois and its customers would not otherwise incur. We therefore find that the removal of these devices for individual circuits, rather than multiple circuits, is appropriate.

The CLECs also assert that Ameritech Illinois' engineering practices for ADSL and ISDN are to condition loops on a multiple basis, and therefore Ameritech Illinois should do so for DLS service. We find no evidence to support either claim. With respect to ADSL, the engineering practices cited by the CLECs relate to Project Pronto and the deployment of new infrastructure. Specifically, these guidelines provide that "ADSL binder groups will be in 25 pair complements." This does not mean that Ameritech Illinois will *condition existing* loops 25 pairs at a time, rather, it means that Ameritech Illinois will *deploy new* the loops in 25 pair complements.

With respect to ISDN, the document that the CLEC Coalition claims proves that Ameritech Illinois deloads eight pair at a time for ISDN actually is referring to *spare pairs*. In other words, it is referring to cable pairs that are *not in use*. This distinction is critical. Ameritech Illinois has stated that, because many pairs in a 50 pair binder group are working pairs, it cannot de-load all 50 pairs at the same time (as the CLEC Coalition requests) without

having existing POTS customers experience service outages or degradation. This, however, is what the CLECs propose that Ameritech Illinois do. In any event, we note that ADSL and ISDN services are not the subject of this proceeding and it has not been established that either service is in any way comparable to DSL service.

We also reject the CLEC Coalition's argument that loop conditioning costs should be recovered through recurring charges. As a preliminary matter, the record does not contain any support for the assertion that a recurring charge is more appropriate than a non-recurring charge and, even if it did, there is no evidence with which the Commission could set a recurring charge. More importantly, if Ameritech Illinois does not recover the full cost of conditioning activity from the requesting carrier up front, Ameritech Illinois may never fully recover the cost, as it is entitled to under the law. Indeed, a CLEC could simply order a conditioned loop and a month later (before the full cost of the conditioning is recovered) discontinue providing service over that loop. Ameritech Illinois would then be left holding the bag. Moreover, a recurring charge would force all CLECs to pay for loop conditioning, even those CLECs who have not and will not ever request conditioning. The FCC, however, specifically held that the *requesting CLEC* (the cost causers), *not all CLECs*, must pay for loop conditioning. *UNE Remand Order*, ¶¶ 192-193; *Line Sharing Order*, ¶ 82. The CLEC Coalition's argument is simply another attempt to evade the FCC's order that ILECs, such as Ameritech Illinois, are entitled to recover the cost of loop conditioning from requesting carriers, and the Commission must reject it.

Finally, we reject the CLEC Coalitions argument that recurring charges are appropriate because SBC announced that non-recurring charges for loop conditioning would be replaced with a monthly recurring charge of $1.67 for all xDSL qualified loops between 12,000 and 17,500 feet. There is absolutely no record evidence concerning SBC's purported announcement or the monthly recurring charge of $1.67. Although the CLEC Coalition attached to its brief a memorandum from Pacific Bell to CLECs, this document has not been the subject of testimony or cross-examination. Moreover, the document, on its face, applies only to carriers that have entered into 13-state interconnection agreements with the SBC ILECs, is implementable only through a global amendment to such 13-state agreements, and provides for numerous other terms and conditions. If the CLECs are interested in taking advantage of the Pacific Bell "Accessible Letter," they can do so, *in the manner provided for in that Letter*.

For the above reasons, we adopt Ameritech Illinois' proposed loop conditioning charges and reject the CLECs' proposals.

B. MANUAL LOOP QUALIFICATION CHARGE

The HEPO's recommended Commission Analysis and Conclusion Section on page 50 should be replaced with the following:

Commission Analysis and Conclusion:

We adopt Ameritech Illinois' $1.98 proposed nonrecurring charge for manual loop qualification. This price was determined pursuant to the merger order in *In re SBC Communications, Inc.*, ICC Docket No. 98-0555 at 197(Sept. 23, 1999), and is based on

"reasonable direct costs." Ameritech Illinois has proven that this charge is reasonable, and the CLECs have not proposed any charge that they believe is more reasonable.

Staff raises concern that Ameritech Illinois' proposed charge *may* be excessive, however, as Staff admits there is no evidence to support this assertion. Although Rhythms argues that the price appears reasonable, it requests that we reject the proposed price without more specific support. This proposal is without merit. Ameritech Illinois has provided adequate support for this price. This price was calculated by marking up the hourly engineering labor rate of $88.68 by 33.6% for joint and common costs, and dividing that quantity by 60 minutes. [$1.98=($88.68 x 1.336)/ 60 minutes].

We also reject Rhythms' argument that it should only be charged for mechanized loop qualification because "xDSL services have been available for years" and, therefore, "most of the basic loop qualification information should have been captured in Ameritech Illinois' databases some time ago." There is no record support for this assertion. As explained by Ameritech Illinois, it had no legal obligation or business reason to collect and mechanize this information before the FCC issued its *Line Sharing Order* creating the new HFPL UNE. Indeed, because the HFPL UNE did not exist prior to the FCC's *Line Sharing Order*, Ameritech Illinois simply had no reason to develop an automated database associated with a non-existent UNE. More importantly, there is no evidence that all loop qualification information is contained in Ameritech Illinois' electronic databases, and requiring Ameritech Illinois to create new databases to support the CLECs' provisioning of service would be unlawful. Indeed, the FCC has held ILECs have no obligation to construct new databases on behalf of requesting carriers. *UNE Remand Order*, ¶429.

In summary, the record establishes that Ameritech Illinois' proposed $1.98 per minute nonrecurring price for Manual Loop Qualification is reasonable and should be adopted.

VIII. LINE SHARING RATES

A. HFPL recurring charge

The HEPO's recommended Commission Analysis and Conclusion Section on page 52 should be replaced with the following:

Commission Analysis and Conclusion:

We adopt Ameritech Illinois' proposed HFPL monthly recurring charge of 50% of the Commission-approved monthly recurring unbundled loop price. This price is fully consistent with the FCC's TELRIC principles and is reasonable given that the cost of the loop is shared by two services. The price also encourages CLECs to enter the residential market and provides a significant discount in comparison to the price CLECs would have to pay for an entire loop, yet unlike the CLECs proposal, Ameritech Illinois' proposal does not require Ameritech Illinois to give away the HFPL product. The CLECs proposed zero price conflicts with the legal requirements of Section 252(c) and 252(d)(1), and would give data CLECs an unfair and artificial competitive advantage over other advanced service technologies.

In setting the HFPL UNE price, the Commission must abide by the legal requirements of Section 252(c) of the Act. Section 252(c) explicitly states that prices for unbundled network elements must be established according to Section 252(d). Section 252(d), in turn, states that a commission's determination of UNE prices *shall* be "based on the cost (*determined without reference to a rate-of-return or other rate based proceeding*) of providing the …network element" and "may include a reasonable profit." (emphasis added). The Commission recognizes that Section 252(d) of the Act (as well as the FCC's TELRIC methodology) requires a complete separation between UNE pricing and retail pricing. Indeed, Section 252(d) mandates that the price of an UNE be determined without reference to a rate-of-return or other rate-based proceedings. Moreover, TELRIC-based prices are determined independent of current retail revenues. The TELRIC methodology divides all of the costs of the network among the UNEs that can be provided by the network.

Given these principles, the Commission must reject CLECs' argument that a 50% HFPL UNE prices results in double recovery or windfall profits. Whether those costs are currently being recovered by retail voice services is irrelevant in setting the price of UNEs. Indeed, in it its Order approving the SBC/Ameritech merger, the FCC necessarily found that any potential for double recovery was irrelevant when it established a surrogate line sharing discount of 50% of the cost of the entire unbundled loop for unaffiliated CLECs when actually line sharing was not available. *See SBC/Ameritech Merger Order*, ¶ 467; Appendix C (Conditions Appendix), ¶ 14. Moreover, even if double recovery were legally relevant, there is no evidence that Ameritech Illinois is recovering the entire cost of the loop in retail rates. Indeed, Ameritech Illinois has not been subject to rate of return regulation since 1994, as it has been subject to price cap regulation since that time. Significantly, under the CLECs' proposal, Ameritech Illinois would be providing the use of the HFPL to the CLEC for free, a result that is wholly inconsistent with normal business practices.

The 50% HFPL price proposed by Ameritech Illinois also complies with TELRIC standards. Under TELRIC standards, the price of the loop is a *shared* cost that must be allocated between the two services that cause the cost. As pointed out by Ameritech Illinois, the TELRIC methodology only establishes the cost of the *entire* loop, as cost causation cannot be established between the HFPL and the voice portion. The *First Report and Order* requires an allocation of the shared loop cost, and the only logical way to do so is to split the cost equally between the two services using the loop. The Commission finds no rationale for allocating none of the shared cost to the high frequency portion of the loop and the entire cost to the low frequency portion of the loop.

Additionally, in the FCC's SBC/Ameritech merger conditions, the FCC acknowledged that if an SBC ILEC charged unaffiliated CLECs the same amount for a loop as it charged its affiliated CLEC, pro-competitive pricing for xDSL service would result. The FCC addressed this issue in the context of how to provide the equivalent of line sharing to unaffiliated CLECs, since actual line sharing was not previously available to CLECs. The FCC created a solution by establishing a surrogate line sharing discount—50 percent off the recurring and non-recurring price of the loop—for CLECs to obtain an entire loop from a SBC ILEC to use to provide advanced services to a customer receiving voice grade service from an SBC/Ameritech ILEC.

The FCC referred to this as "the economic equivalent of line sharing." The FCC found that such a price would

> spur deployment of advanced services by SBC/Ameritech, as well as other carriers, while ensuring that these other carriers receive treatment from an SBC/Ameritech incumbent LEC comparable to that provided to the SBC/Ameritech separate affiliate.

This is the exact same price Ameritech Illinois is proposing for line sharing in this arbitration, and will produce the same result as that which the FCC concluded would occur.

Staff urges the Commission to attribute 0% of joint and common loop costs to the HFPL because, in its opinion, Ameritech Illinois historically has allocated 100% of such costs to voice and, accordingly, has allocated 0% to the HFPL. Although Staff believes that the fact that Ameritech Illinois is subject to alternative regulation is irrelevant, we disagree. It cannot be assumed that rates set through price cap regulation, rather than rate of return regulation, always recover 100% of the ILEC's costs. Indeed, because Ameritech Illinois is not subject to rate of return regulation, its rates are no longer designed to automatically recover the company's costs, as Staff and the CLECs assume in this case. Accordingly, Ameritech Illinois' retail rates cannot properly be used to support the conclusion that Ameritech Illinois recovers 100% of its cost through voice service. Indeed, given that Ameritech Illinois is under price cap regulation, there is absolutely no support for the position that Ameritech Illinois recovers 100% of its costs through voice service.

Rhythms argues that the Commission should adopt a zero price for the HFPL because the HFPL creates no incremental cost in the existing loop. We disagree. As explained by Ameritech Illinois, the HFPL is a dedicated service that uses the loop and, therefore, it causes the loop cost along with any other dedicated service that uses the same loop. A cost-based price for use of the HFPL should, therefore, include a portion of the cost of the loop. Indeed, the record establishes there are two dedicated services on a shared line, and there is no meaningful evidence that more or less than 50 percent of the loop cost should be allocated to either service. Moreover, the provision of line sharing causes additional network and operational costs. The price of the HFPL UNE should include the actual incremental facilities and operations costs caused by sharing the loop.

We also reject Rhythms' argument that "sound policy considerations" require a zero rate for the HFPL. To the contrary, policy dictates that Ameritech Illinois charge a positive price for the HFPL UNE. Rhythms claims that a non-zero price would be discriminatory and would lead to double recovery for Ameritech Illinois, these arguments are without merit. *First*, data CLECs are protected from the possibility of discriminatory behavior by the fact that Ameritech Illinois does not provide DSL service. Instead AADS, a separate affiliate, is the only SBC/Ameritech entity that provides xDSL service in Illinois and, more importantly, CLECs will receive this UNE at the same price and on the same terms and conditions as AADS. In fact, in requiring SBC/Ameritech to offer DSL service through a separate subsidiary, the FCC established safeguards that "are intended to ensure that an affiliate will not derive unfair advantages from the incumbent." FCC 99-279, Memorandum Opinion and Order, Ameritech/SBC Merger, CC Docket No. 98-141, Released October 8, 1999, Paragraph 467.

Second, contrary to Rhythms' arguments, a zero price for the HFPL UNE would be discriminatory *in* favor of data CLECs. The monthly recurring charge for Ameritech Illinois' HFPL UNE must be set at a positive amount so as not to distort the marketplace relative to advanced services. Pricing the HFPL at zero would artificially favor one advanced services technology competitor (DSL providers) over other advanced services technology competitors (such as cable modem, direct broadcast, satellite DBS and fixed wireless providers). Indeed, DSL is just one of several technologies that is currently competing in the advanced services marketplace. Notably, in other proceedings, advanced service competitors such as AT&T have recognized that "a zero price for HFPL is both anti-competitive and unjustified when viewed in light of the entire telecommunications market place." Specifically, a zero price would permit data CLECs to bear no cost for one of the most important assets they utilize in providing their service, while other advanced service providers are required to pay for the assets they utilize in providing service. Staff agrees that, where there are several providers of advanced services technology, it would not promote efficient competition for one provider to pay nothing for the facilities necessary to provide the service, while the other providers must pay for the necessary facilities. In short, it would give DSL providers an unfair and artificial competitive advantage over these other types of providers if they were able obtain for free the facilities necessary to provide advanced services. We therefore reject that proposal.

With respect to Rhythms' double recovery argument, as stated above, there is no record evidence to support the assertion that Ameritech Illinois recovers the costs of the entire loop through retail rates. Even more importantly, under the applicable law, the price for the HFPL cannot be impacted at all by Ameritech Illinois' retail rates for voice service. Section 252(d)(1) states that the charge which applies to the CLECs for their purchase of the HFPL does not depend on what charge an end-user pays for the voice portion of the line. Indeed, whether the UNE-related costs are currently being recovered by retail voice services is irrelevant in setting the price of UNEs.

Significantly, in its *SBC/Ameritech Order* approving the SBC/Ameritech merger, the FCC necessarily found that any potential for "double recovery" of such costs through retail rates was irrelevant when it established a surrogate HFPL price of 50% of the cost of an entire unbundled loop for unaffiliated CLECs when actual line sharing was not available. *See SBC/Ameritech Merger Order*, ¶467; Appendix C (Conditions Appendix), ¶14. In any event, even if the Commission has concerns about double recovery, the solution is not to set a zero price for the monthly recurring HFPL charge. Indeed, to do so would be unreasonable and unlawful given the FCC's directive (not to mention this Commission's prior conclusions in Dockets 96-0486/0569) that all UNEs should contribute to the recovery of shared and common costs. The Commission therefore must set the HFPL price at some positive amount.

The CLEC Coalition also argues that Ameritech Illinois has not met its burden of proving that it will in fact incur costs as a result of line sharing. As a preliminary matter, the FCC has recognized (and the parties to this proceeding appear to agree) that line sharing does not lend itself to cost estimation using the TELRIC methodology. *See* FCC 99-355, *Third Report and Order* in CC Docket No. 98-147, Released December 9, 1999, ¶¶ 138-139. Indeed, the TELRIC methodology was not designed for dividing shared costs and, in fact, breaks down under the

conditions imposed by line sharing. In the FCC's words, the issue is how to divide shared loop costs. Because TELRIC was designed for estimating direct costs, it provides little guidance for allocating shared costs. Other than estimating the underlying cost of the loop and the incremental cost associated with line sharing, the TELRIC methodology does not offer a meaningful basis for the cost-based pricing of the high-frequency spectrum UNE.

Despite the difficulty in applying TELRIC, we believe that Ameritech Illinois has provided adequate support for Ameritech Illinois' proposal that the monthly recurring price for utilizing the HFPL be 50% of the Commission approved monthly recurring unbundled loop price (plus the incremental facilities and operations costs caused by sharing the loop). *First Report and Order*, ¶682. The monthly recurring unbundled loop price has been approved by the Commission and, therefore, has already been proven TELRIC based. Under the FCC's TELRIC principles, the cost of a line-shared loop is a *shared* cost that must be allocated between the services that cause that cost. Ameritech Illinois' proposed recurring HFPL price of 50% of the loop is fully consistent with the FCC's TELRIC pricing principles as the cost of the loop is shared by two services. This is a reasonable approach to setting the price for this new unbundled network element.

We also disagree with the CLEC Coalition's argument that line sharing should be treated as an enhancement to voice service. The FCC has treated the HFPL as a separate UNE, not as an enhancement to voice service, and it should be treated accordingly. We also reject the CLECs' arguments that a non-zero price would not result in higher than necessary prices for retail xDSL service. As pointed out by Ameritech Illinois, retail prices are solely in the control of the CLECs.

In summary, Ameritech Illinois' proposed charge for the HFPL is based on a reasonable approach for setting the price for this new unbundled network element and is adopted.

B. RECURRING OSS MODIFICATION CHARGE

The HEPO's recommended Commission Analysis and Conclusion Section on page 53 should be replaced with the following:

Commission Analysis and Conclusion:

The Commission agrees with Ameritech Illinois that CLECs must pay for OSS upgrades necessary to accommodate line sharing. The FCC has held that Ameritech Illinois and other ILECs are entitled to recover their line sharing-related OSS costs from CLECs. In particular, the FCC stated in paragraph 144 of its *Line Sharing Order*:

> We find that incumbent LECs should recover in their line sharing charges those reasonable incremental costs of OSS modification that are caused by the obligation to provide line sharing as an unbundled network element.

The FCC also clearly approved of Ameritech Illinois and other ILECs recovering these costs through recurring charges over a reasonable period of time. In the FCC's words:

> [T]he states may require incumbent LECs in an arbitrated agreement to recover such nonrecurring costs such as these incremental OSS modification costs through recurring charges over a reasonable period of time,

We find that Ameritech Illinois' proposed rate for OSS modification is reasonable and represents the costs that actually will be incurred by SBC/Ameritech Illinois to modify its OSS systems to support line sharing. Therefore it will be adopted. No party has presented evidence that Ameritech Illinois is not incurring these costs, or that the costs are not reasonable, or that a different rate would be more reasonable. We further find that recovery over a three-year period is reasonable.

Staff admits that Ameritech Illinois incurs costs as a result of OSS modification. Nevertheless, Staff concludes that a charge of $0 is appropriate because it believes Ameritech Illinois' costs are "not well supported in this record." We disagree. The record establishes that the OSS modification rate was developed based on the vendor costs of implementing the OSS modification and on a product management demand forecast of the number of shared lines that will be provisioned over the next three years for the entire SBC/Ameritech serving area. This information was then used to compute the monthly cost per line on a present value basis using the 9.52% weighted average cost of capital authorized in the Commission's TELRIC order. No party has presented evidence that Ameritech Illinois is not incurring these costs or that these costs are not reasonable. In fact, as stated above, Staff agrees that Ameritech Illinois is incurring costs for OSS modifications. Given that the *Line Sharing Order* gives ILECs the right to recover the cost of OSS modifications when incurred, we cannot impose a zero price as Staff recommends.

We also do not share Staff's concerns about the total cost of the software upgrade. As explained by Ameritech Illinois, the dollar amount that forms the basis of the OSS modification charge development was the vendor price that was negotiated by the SBC procurement organization and represents the cost that SBC must incur on behalf of its incumbent local exchange carriers, including Ameritech Illinois, to implement the FCC's *Line Sharing Order*. This cost reflects a complicated upgrade to a network of support systems. Significantly, the vendor's customer base over which it can recoup its software development consists *only* of incumbent local exchange carriers in the U.S. The record establishes that Ameritech Illinois' proposed OSS modification charge is reasonable, and no party has presented any evidence to the contrary.

We also reject Staff's proposal that a five-year recovery period be used instead of a three-year recovery period. The record reveals several reasons why a three-year recovery period is more reasonable than a five-year recovery period. *First*, the longer period of time over which Ameritech Illinois spreads the recovery of these OSS modification costs, the more risk Ameritech Illinois faces that the OSS systems will become obsolete and Ameritech Illinois will not recover the costs of the software upgrade. We do not believe Ameritech Illinois should be exposed to such risk. *Second*, Ameritech Illinois has to pay for the entire cost of the software upgrade *upfront*, and it is not reasonable to require Ameritech Illinois to carry this cost on behalf of CLECs for longer than three years. *Third*, given the monthly revenue potential for CLECs, the OSS modification charge proposed by Ameritech Illinois will not constitute a barrier to entry into the advanced services market.

Even assuming that Ameritech Illinois' OSS modification costs are not well supported (which is not the case), the solution is not to require Ameritech Illinois to absorb the entire cost of OSS modifications. Indeed, doing so would be contrary to the FCC's determination that Ameritech Illinois and other ILECs are entitled to recover their line sharing-related OSS costs from CLECs, which Staff admits Ameritech Illinois incurs. *Line Sharing Order* (¶144). Specifically, the FCC stated,

> We find that incumbent LECs should recover in their line sharing charges those reasonable incremental costs of OSS modification that are caused by the obligation to provide line sharing as an unbundled network element.

Id.

Rhythms argues we should reject Ameritech Illinois' proposed charge for OSS modification because SBC will incur the costs as a result of its merger related commitments to the FCC. We disagree. Rhythms recommendation is contrary to the FCC's unequivocal finding that Ameritech Illinois and other ILECs "*should* recover in their line sharing charges those reasonable incremental costs of OSS modification that are caused by the obligation to provide line sharing as an unbundled network element." *Line Sharing Order*, ¶144. The *Line Sharing Order* specifically allows ILEC to recover the cost of OSS modification charges *regardless* of whether they were incurred to enable an affiliated CLEC, as well as unaffiliated CLECs, to gain access to the HFPL. Clearly, Ameritech Illinois did not incur OSS modification costs solely for its affiliated CLEC, AADS, to submit HFPL orders. Rather, these OSS modifications were necessary to enable *all* CLECs to submit HFPL orders. Without these modifications, *no* CLEC could order the HFPL.

We also reject Rhythms' argument that the Commission must reject Ameritech Illinois' proposed charge for OSS modification because Ameritech Illinois has not provided the detailed information required by the *Line Sharing Order* for the Commission to determine the extent to which any OSS upgrades or modifications benefit Ameritech Illinois' own operations (or those of its affiliate), as opposed to being required solely for the provisioning of line sharing for unaffiliated competitors. Rhythms misreads paragraph 106, which it cites as support for its position. As a preliminary matter, paragraph 106 does not set forth a "test" that requires "detailed information" about the extent to which modifications benefit the company. Paragraph 106 merely states that some ILECs "may decide to develop new OSSs to accommodate *their* inventory needs as *their* product and service offerings increase" and, therefore, the ILECs should not be permitted "to attribute an unreasonable portion of their OSS development costs" to the unbundling requirement.

More importantly, the record establishes that none of its OSS modification costs benefit Ameritech Illinois. Indeed, Ameritech Illinois does not provide DSL service and, therefore, does not benefit from the OSS modifications. It is irrelevant that AADS will benefit from the OSS modifications. Indeed, neither paragraph 106, nor any other paragraph of the *Line Sharing Order*, differentiates between OSS modification costs attributable to affiliated CLECs as opposed to unaffiliated CLECs. Rather, the paragraph differentiates between OSS that benefit the *ILEC*, as opposed to those that benefit CLECs generally. In short, the *Line Sharing Order*

allows ILECs to recover the cost of OSS modification charges regardless of whether they were incurred to enable affiliated CLECs to gain access to the HFPL.

The CLECs also raise concern that the xDSL demand assumed in its cost analysis is lower than the forecast contained in its investor briefing. We do not share this concern. The evidence establishes that the forecast in the investor briefing was too high for projecting the DSL customers within the 13-state SBC territory for home run copper loops for at least two reasons. *First*, this forecast is too high because it includes the xDSL lines SBC expects to serve *outside* the SBC 13-state region, not just the xDSL lines within the SBC 13-state region. *Second*, the investor briefing forecast is too high because it includes *all* xDSL lines, not just line shared xDSL lines. For example, the investor briefing forecast includes xDSL lines provided via Project Pronto and stand-alone loops. In short, the investor briefing forecast includes all potential xDSL customers, line shared or otherwise, and therefore is too high to reflect the demand for line-shared xDSL lines in the SBC 13-state region. Tr. at 1210-1211.

Rhythms suggests that it is "unclear whether Ameritech Illinois should be allowed *any* recovery of OSS upgrade costs." Specifically, Rhythms asserts that there is no evidence that these costs meet the TELRIC standard of being efficient forward-looking economic costs. Again, this assertion is directly contrary to the FCC's holding that ILECs are entitled to recover OSS modification charges. *Line Sharing Order*, ¶144. More importantly, Rhythms' proposal admittedly requires OSS modification charges to be determined based on the most efficient network configuration assuming that the network were rebuilt from scratch today. This approach was rejected by the Eighth Circuit in *IUB III*.

In summary, we adopt Ameritech Illinois' OSS modification charge. The FCC has specifically held that CLECs are entitled to recover the cost of OSS modification, and the record clearly establishes that Ameritech Illinois is incurring such costs. Accordingly, the zero price proposed by the CLECs has no factual or lawful basis. Ameritech Illinois' proposed charge, on the other hand, is fully supported and should be adopted by the Commission.

C. RECURRING AND NONRECURRING CROSS CONNECT CHARGES

The HEPO's recommended Commission Analysis and Conclusion Section on page 54 should be replaced with the following:

Commission Analysis and Conclusion:

We find that Ameritech Illinois' proposed recurring and nonrecurring cross connect charges are reasonable and comply with the FCC's TELRIC rules and this Commission's prior determination in Docket Nos. 00-0312/00-0313. Those charges are adopted. The CLECs' proposal that cross connect charges should be based on a configuration where the splitter is located on the Main Distribution Frame (MDF) has no legal or factual basis and is rejected.

While the CLECs criticize Ameritech Illinois' proposed charges, their criticisms uniformly miss the point. Rhythms argues that Ameritech Illinois' proposed cross connect charges purportedly are based on an inefficient network configuration that contains extra and unnecessary tie cables and jumpers, and that the cost of cross connects should be set as if the

splitter were located on the incumbent's MDF. The Commission must reject this proposal. Rhythms' position ignores the critical fact that TELRIC does *not* contemplate that the incumbent must, for pricing purposes, redesign its network in a way that minimizes the cost of one particular service or maximizes the economic benefits enjoyed by one particular service provider or select group of service providers. Rather, as the FCC stated in paragraph 685 of its *First Report and Order*, the TELRIC methodology employs a "benchmark of forward-looking cost and existing network design [that] represents the incremental costs that incumbents actually expect to incur in making network elements available to new entrants." Moreover, the CLECs ignore the fact that Ameritech Illinois' proposed price uses the same cost inputs and the same shared and common cost allocations approved by the Commission in its February 17, 1998 Order in Docket No. 96-0486/98-0569 ("Ameritech TELRIC proceeding"). This matter is also directly impacted by the Eight Circuit's decision in *IUB III*, where the court held that cost elements should reflect the network configuration that Ameritech Illinois actually anticipates using to provision the HFPL UNE elements to CLECs. Significantly, Staff agrees that the cost of cross connects should not be based on a configuration where the splitter is located on the MDF. Indeed, Staff finds that Ameritech Illinois' cross connect charges are TELRIC-based and should be adopted by the Commission.

We also disagree with Rhythms' argument that Ameritech Illinois' proposed disconnect charge is flawed because the charge should be assessed at the time of disconnection, not at installation. We find that it is proper to charge upfront for disconnection. Specifically, the CLEC requesting the line shared service is the cost causer of both the installation and disconnection of the cross connects and, accordingly, must be responsible for the cost of these activities. Rhythms' argument that this charge is inappropriate because voice service is typically disconnected at the same time as the data service does not change this fact. Additionally, Rhythms' argument that it takes less time to disconnect a pair than to install the pair lacks evidentiary support.

We are not concerned that the charges proposed by Ameritech Illinois are higher than the prices negotiated between SBC and Covad to uniformly apply across SBC's entire 13-state region, based on a negotiated settlement between SBC and Covad that covered many other issues. The negotiated prices agreed to with Covad are not relevant to this proceeding and do not represent the appropriate Illinois-specific tariff price for cross connects. Specifically, the arrangement between Covad and SBC was the result of the negotiation process between those two companies, and the record in this case does not disclose the specifics of that give and take process. It would be pure speculation on our part to assume that the cross connect prices agreed to by Ameritech Illinois and Covad were based solely on the actual cost of those facilities, rather than being the product of the negotiation process. Moreover, there is no requirement that the prices *negotiated* between SBC and Covad be cost-based. In any event, the record establishes that those negotiated prices are not state-specific, but apply across SBC's entire 13 state region.

We also reject Rhythms' assertion that the prices in the agreement with Covad may be anticompetitive or discriminatory because they are not cost-based. The terms of the SBC/Covad agreement, once it is filed with and approved by this Commission under Section 252(e) of the Act, will be available to all other CLECs pursuant to and consistent with the requirements of Section 252(i) of the federal Act. Our obligation and authority in this proceeding is to establish

prices for cross-connects that comply with the applicable cost rules under Section 252(d) of the Act. As noted above, the charges proposed by Ameritech Illinois meet that standard.

In sum, the CLECs have made the exact same assertions with respect to cross-connect charges as they made in Docket Nos. 00-0312/0313. We rejected those assertions in that Docket and we do so again here, because the CLECs have provided nothing new for the Commission to consider. Ameritech Illinois' proposed recurring and non-recurring prices for cross connect jumpers are reasonable and should be adopted.